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JAMES H. McKENNEY

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE CHICAGO DISTILLING COMPANY
vs.
RENSSALAER STONE, COLLECTOR OF internal revenue.
No. 130.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

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RECORD.

simplicity; the complications which obscure the subject begin with the highly artificial and ingeniously confusing regulation promulgated by the Treasury Department, and will end when that regulation shall have been abrogated, and a simple system of daily accountability, in accordance with the letter and spirit of the statute, instituted in its place.

RECAPITULATION.

Stipulation § 4. Tubs Nos. 11, 12, and 13, surveyed capacity $1315\frac{38}{100}$ bushels, were lawfully open on Sept. 25th, and lawfully filled with $1315\frac{38}{100}$ bushels of grain, which $1315\frac{38}{100}$ bushels of grain were lawfully distilled Sept. 29th.

Stipulation § 3.

Stipulation § 4. Tubs Nos. 14, 15, and 1, surveyed capacity $1315\frac{38}{100}$ bushels, were lawfully open on Sept. 26th, and lawfully filled with $1315\frac{38}{100}$ bushels of grain, which $1315\frac{38}{100}$ bushels of grain were lawfully distilled Sept. 30th.

Stipulation § 3.

Stipulation Column A, Table following § 5. The Government estimate of the grain-distilling capacity of tubs Nos. 11, 12, and 13 on Sept. 29th was $1169\frac{24}{100}$ bushels, and of tubs Nos. 14, 15, and 1 on September 30th, $1169\frac{24}{100}$ bushels. This is a fictitious and constructive estimate, at variance with the survey and contrary to law. Any regulation which attempts to establish and enforce such a rule of computation attempts to change the capacity which, by the survey, was unalterably fixed for the tubs in question.

Stipulation § 5. The error in the calculation amounts to $292\frac{28}{100}$ bushels, and the assessment so far as based on that quantity (namely, to the amount of $\$57\frac{35}{100}$) was illegal.

Morrill *vs.* Jones, 106 U. S., 467. "The secretary of the Treasury can not by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding."

All which is respectfully submitted.

JOSEPH KIRKLAND,
Att'y for plaintiff in error.

E. B. Kaum
of Counsel

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THE CASE.

The plaintiff was a distiller in the first internal revenue district of Illinois. The defendant was the collector of internal revenue for that district. The action was to recover taxes exacted from the distiller by the defendant collector on an assessment by the Commissioner of Internal Revenue claimed to be illegal. The judgment of the court below was for the defendant. The case was submitted to the court by a written stipulation waiving a jury (Rec., p. 11), on an agreed statement of facts (p. 12–18, inclusive) from which it appears—

First. That the amount sought to be recovered was paid under protest.

Second. That on the Government plan and survey plaintiff's distillery contained fifteen fermenting tubs, numbered from 1 to 15, with a capacity of 438.46 bushels of grain; that its fermenting period was three days of twenty-four hours each, and that its producing capacity

for a day of twenty-four hours was fixed by the proper officers of the Internal Revenue Department at 146.15 bushels of grain per tub, open.

Third. That openings and closings of the tubs on due notice by the distiller, during the month of September, 1885, together with the grain mashed, the fermenting beer brought over from August, and the grain distilled are all as contained in the following table:

Mashing.			Distillation.		
Day of month.	Fermenting tubs opened by collector and filled by distiller.	Grain mashed.	Day of month.	Fermenting tubs emptied by distiller and closed by collector.	Grain used; *i. e.* distilled.
	Serial Nos.	*Bushels.*		*Serial Nos.*	*Bushels.*
	Brought forward from August: Nos. 8, 9, 10, 11, 12, and 13.	2,631.00	1	Nos. 8, 9	877.00
			2	Nos. 10, 11	877.00
			3	Nos. 12, 13	877.00
1	Nos. 14, 15	877.00		(The above were filled in August.)	
2	Nos. 1, 2	877.00			
3	Nos. 3, 4, 5	1,315.50			
4	Nos. 6, 7	877.00	4	Nos. 14, 15	877.00
5	Nos. 8, 9	877.00	5	Nos. 1, 2	877.00
7	Nos. 10, 11, 12	1,315.50	7	Nos. 3, 4, 5	1,315.50
8	Nos. 13, 14, 15	1,315.50	8	Nos. 6, 7	877.00
9	Nos. 1, 2, 3	1,315.50	9	Nos. 8, 9	877.00
10	Nos. 4, 5, 6	1,315.50	10	Nos. 10, 11, 12	1,315.50
11	Nos. 7, 8, 9	1,315.50	11	Nos. 13, 14, 15	1,315.50
12	Nos. 10, 11, 12	1,315.50	12	Nos. 1, 2, 3	1,315.50
14	Nos. 13, 14, 15	1,315.50	14	Nos. 4, 5, 6	1,315.50
15	Nos. 1, 2, 3	1,315.50	15	Nos. 7, 8, 9	1,315.50
16	Nos. 4, 5, 6	1,315.50	16	Nos. 10, 11, 12	1,315.50
17	Nos. 7, 8, 9	1,315.50	17	Nos. 13, 14, 15	1,315.50
18	Nos. 10, 11, 12	1,315.50	18	Nos. 1, 2, 3	1,315.50
19	Nos. 13, 14, 15	1,315.50	19	Nos. 4, 5, 6	1,315.50
21	Nos. 1, 2	877.00	21	Nos. 7, 8, 9	1,315.50
22	Nos. 3, 4	877.00	22	Nos. 10, 11, 12	1,315.50
23	Nos. 5, 6, 7	1,315.50	23	Nos. 13, 14, 15	1,315.50
24	Nos. 8, 9, 10	1,315.50	24	Nos. 1, 2	877.00
25	Nos. 11, 12, 13	1,315.50	25	Nos. 3, 4	877.00
26	Nos. 14, 15, 1	1,315.50	26	Nos. 5, 6, 7	1,315.50
28	Nos. 2, 3	877.00	28	Nos. 8, 9, 10	1,315.50
29	Nos. 4, 5	877.00	29	Nos. 11, 12, 13	1,315.50
30	Nos. 6, 7, 8	1,315.50	30	Nos. 14, 15, 1	1,315.50
		33,326.00			
	Deduct mashing of 28th, 29th, and 30th Sept., carr. forward to Oct.	3,069.50			
		30,256.50			30,256.50

Fourth.—That because of the foregoing operations an assessment of $57.83 was made in regular form and apt time against the plaintiff by the Commissioner of Internal Revenue and duly certified to the defendant collector. This was made on the ground that the grain distilled exceeded the surveyed capacity per tub open. The daily capacity, as determined by the Commissioner, compared with the grain used or distilled, is shown in the following tabulated statement:

	Surveyed daily capacity.	Grain actually distilled.
	Bushels.	*Bushels.*
Sep. 1	876.93	877.00
2	876.93	877.00
3	876.93	877.00
4	1,023.08	877.00
5	1,023.08	877.00
7	1,023.08	1,315.50
8	1,023.08	877.00
9	1,023.08	877.00
10	1,023.08	1,315.50
11	1,315.39	1,315.50
12	1,315.39	1,315.50
14	1,315.39	1,315.50
15	1,315.39	1,315.50
16	1,315.39	1,315.50
17	1,315.39	1,315.50
18	1,315.39	1,315.50
21	1,315.39	1,315.50
22	1,169.24	1,315.50
23	1,169.24	1,315.50
24	1,169.24	877.00
25	1,169.24	877.00
26	1,169.24	1,315.50
28	1,169.24	1,315.50
29	1,169.24	1,315.50
30	1,169.24	1,315.50
	29,961.69	30,256.50

Excess of grain distilled over capacity, 294.81.

The claim made by the plaintiff is that the surveyed capacity by law, day by day, should be the same as the grain actually distilled, as here shown.

The capacity as surveyed in the foregoing table was in accordance with circular No. 238, issued by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury, and of which the plaintiff was fully advised. The circular is as follows :

[Circular No. 238.]

Regulations concerning changes in capacity by grain and molasses distillers.

1881.
DEPARTMENT No. 61.
Internal Revenue.

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C., May 27, 881

The existing regulations concerning changes made in the daily spirit-producing capacity of grain and molasses distilleries, by the closing or opening of fermenting tubs, are hereby modified as follows:

Hereafter, when fermenting tubs are closed in a grain or molasses distillery, either on one day or on certain successive days in one fermenting period, pursuant to a notice from the distiller of his intention to reduce the producing capacity of his distillery, and thereafter to manufacture daily a certain less quantity of spirits, the reduction in capacity resulting from closing the tub or tubs named in the distiller's notice will be deemed to occur, and will be allowed to the full extent of the total daily capacity of the tub or tubs closed, at the end of the same number of hours after the closing of the first tub which is fixed by the survey as a fermenting period for the distillery—that is, seventy-two hours, ninety-six hours, or one hundred and forty-four hours, as the case might be.

In like manner, when fermenting tubs are opened,

either on one day or on certain successive days in one fermenting period, pursuant to notice by the distiller of his intention to increase the producing capacity of his distillery, and thereafter to manufacture daily a certain larger quantity of spirits, the increase in capacity resulting from opening such tub or tubs will be deemed to occur, and will be allowed to the full extent of the total daily capacity of the tub or tubs opened, at the end of the same number of hours after the opening of the first tub which is fixed by the survey as a fermenting period for the distillery—that is, seventy-two hours, ninety-six hours, or one hundred and forty-four hours, as the case may be.

Notices of change in capacity will hereafter be given on Form 126, revised, in accordance herewith, and will state the day or successive days, not exceeding one fermenting period in number, upon which tubs are desired to be closed, or to be opened, as the case may be, the serial numbers of the tubs to be closed, or to be opened, each day, the working capacity of each tub in gallons, and its daily capacity in bushels, the daily spirit-producing capacity of the distillery after the change shall be completed, and such other information as is called for by the form.

When a change is to be made by closing tubs, or by opening them, as the case may be, on successive days, the notice should be given upon one Form 126; or, if several notices are given, they should be given at the same time, and bear the same date, and should each state the total change intended.

When notices of changes to be made on successive days are given at different dates, or when tubs are opened or closed on days not immediately successive, only the change in capacity resulting from each opening or closing, as the case may be, will be allowed at the end of a period equal to the fermenting period

fixed by the survey of the distillery, after such opening or closing.

When tubs are opened and other tubs are closed on the same day, their difference, if any, in daily capacity only, will be allowed.

It will be observed that the present practice of holding tubs, not intended to be used, open during the whole or a part of a fermenting period, in order to retain the requisite capacity until the larger quantity of material previously mashed has been distilled, is no longer necessary, because the closing of the tub does not affect the capacity of the distillery at the time of closing; but that, on the contrary, the tub should be closed (if reduction is desired) as soon as emptied (unless emptied before the end of the fermenting period fixed by law, in which case it should be closed at the end of such period) in order that its capacity may be withdrawn from the total capacity of the distillery not later than at the end of one fermenting period, when, because of its being closed, the product of the distillery will be reduced.

So also the opening of tubs for the purpose of increasing capacity will not affect the capacity of the distillery until one fermenting period has elapsed from the opening of the tub or from the opening of the first of a series opened on each of successive days, and until (if the tubes were filled) the spirit product of the distillery is affected thereby.

When the distillery is not using the full fermenting period allowed by law, a change in capacity will take effect, either at the end of the legal fermenting period or on any previous day upon which the spirit product of the distillery is affected by the change.

The certificates of the collector and deputy collector, upon Form 126, will show that the tubs have been closed or opened in the manner required by law

and regulations; the serial numbers of the tubs open, and the serial numbers of the tubs closed, after the change; and the daily capacity of the distillery resulting from the change, and the date when the same takes effect.

These notices are to be given in duplicate, and deputy collectors are hereby required to deliver, or to forward, them to the collector on the day that the fermenting tubs are closed or opened, in accordance with the notice; and collectors are required, on the day of their receipt, to examine the same, append their certificates, and forward one copy to this office. The retention of these notices by deputies, or their accumulation in the office of the collector, must not be permitted.

Collectors will, at once, make requisition for a sufficient number of copies of this circular to furnish every grain or molasses distiller, and each storekeeper, or storekeeper and gauger, and deputy collector, in their respective districts, with a copy of the same, and will direct the officers to call the attention of the distillers to the provisions of the circular, and to instruct them as to the proper methods of making changes in capacity therein prescribed.

They will also make requisition for a full supply of Form 126, revised, and will require all notices of changes in capacity to be given on the revised form.

GREEN B. RAUM,
Commissioner.

Approved:
WILLIAM WINDOM,
Secretary of the Treasury.

ARGUMENT.

The question in this case is how the capacity of a distillery is to be determined in calculating how much, if any, is the excess of grain used over the authorized capacity. In answering this question it is important to know what the statutory provisions are, looking to a determination of the capacity.

STATUTORY PROVISIONS AFFECTING CALCULATION OF CAPACITY.

By section 3259 every person engaged in or intending to be engaged in the business of distiller is required to give notice in writing to the collector of the district wherein such business is to be carried on, stating, among other things, the kind of stills and the cubic contents thereof, the number and kind of boilers, the number of mash tubs and fermenting tubs, the cubic contents of each tub, the number of receiving cisterns, the cubic contents of each cistern, the number of hours the distillery will ferment each tub of mash or beer, the estimated quantity of distilled spirits which the apparatus is capable of distilling every twenty-four hours, a particular description of the lot or tract of land on which the distillery is situated and the buildings thereon, including their size, material, and construction.

Section 3260 requires every distiller to execute a bond before proceeding with the business of distilling, and on the 1st day of May of each succeeding year, conditioned as therein provided.

Section 3263 provides that every distiller, previous to the approval of his bond, shall cause to be made, under the direction of the collector of the district, an accurate plan and description in triplicate of the distillery and distilling apparatus, distinctly showing the location of every still, boiler, doubler, warming tub, and receiving cistern; the course and construction of all fixed pipes used or to be used in the distillery, and of every branch and every cock or joint thereof, and of every valve therein, together with every place, vessel, tub, or utensil from and to which every such pipe leads or with which it communicates; also the number and location and cubic contents of every still, mash tub, and fermenting tub, the cubic contents of every receiving cistern, and the color of each fixed pipe required; a copy of the plan is to be displayed in the distillery, one is to be sent to the collector of the district, and another to the Commissioner of Internal Revenue. The accuracy of such plan and description is to be verified by the collector, the draughtsman, and the distiller.

Section 3264, as amended by 20 Statutes at Large, page 334, section 5, provides that—

> On receipt of notice that any person, firm, or corporation wishes to commence the business of distilling, the collector, or deputy collector to be designated by him, shall proceed in person, at the expense of the United States, with the aid of an assistant designated by the Commissioner of Internal Revenue for the purpose of making surveys of distilleries in that district, to make a survey of such distillery for the purpose of estimating and determining its true spirit-producing capacity for a day of twenty-four hours. In all surveys forty-five gallons of mash or beer

brewed or fermented from grain shall represent not less than one bushel of grain, and seven gallons of mash or beer brewed or fermented from molasses shall represent not less than one gallon of molasses, except in distilleries operating on the sour-mash principle, in which case sixty gallons of beer brewed or fermented from grain shall represent not less than one bushel of grain. A written report of such survey shall be made in triplicate, of which one copy shall be delivered to the distiller, one copy shall be retained by the collecter, and one copy shall be transmitted to the Commissioner of Internal Revenue, and the survey shall take effect on the delivery of such report to the distiller. Whenever the Commissioner is satisfied that any report of the capacity of the distillery is inaccurate or needs revision, he shall direct the collector to make in like manner another survey of said distillery, and the report thereof shall be made and deposited as hereinbefore provided.

Section 3285, as amended by the third section of the act of May 28, 1880 (21 Stats. at Large, 145, chap. 108), provides that every fermenting tub shall be emptied at or before the end of the fermenting period. No fermenting tub in a sweet-mash distillery shall be filled oftener than once in seventy-two hours, nor in a sour-mash distillery oftener than once in ninety-six hours, nor in a rum distillery oftener than once in one hundred and forty-four hours.

Section 3302 provides that the storekeeper assigned to a distillery warehouse shall keep in a book provided for the purpose a daily account of the materials put into the mash tub, or otherwise used for the production of spirits; of the time when any tub is emptied of ripe mash or beer,

recording the same with the number painted on the tub, and of all spirits drawn off from the receiving cistern and the time when the same were drawn off.

Section 3303 provides that the distiller shall keep a similar book, entering into somewhat more minute particulars.

Section 3307 provides that on the 1st day of each month, or within five days thereafter, every distiller shall render to the collector of the district an account in duplicate taken from his books, stating the quantity and kind of materials used for the production of spirits each day, and the number of wine gallons and of proof gallons of spirits produced and placed in warehouse; and prescribes an oath to be taken by the distiller or his principal manager, stating the several quantities of grain, sugar, molasses, and other materials actually mashed and used in said distillery.

Section 3308 provides that every distiller shall make a return of the number of barrels of spirits distilled by him.

Section 3309 provides as follows:

> On the receipt of the distiller's return in each month, the Commissioner of Internal Revenue shall inquire and determine whether the distiller has accounted for all the grain or molasses used and all the spirits produced by him in the preceding month. If he is satisfied that the distiller has reported all the spirits produced by him, and the quantity so reported is found to be less than 80 per centum of the producing capacity of the distillery as estimated according to law, he shall make an assessment of such deficiency at the rate of 90 cents for every proof gallon. In

determining the quantity of grain used, fifty-six pounds shall be accounted as a bushel; and if the Commissioner finds that the distiller has used any grain or molasses in excess of the capacity of his distillery as estimated according to law, he shall make an assessment against the distiller at the rate of 90 cents for every proof gallon of spirits that should have been produced from the grain or molasses so used in excess, which assessment shall be made whether the quantity of spirits reported is equal to or exceeds 80 per centum of the producing capacity of the distillery. If the Commissioner finds that the distiller has not accounted for all the spirits produced by him he shall, from all the evidence he can obtain, determine what quantity of spirits was actually produced by such distiller, and an assessment shall be made for the difference between the quantity reported and the quantity shown to have been actually produced, at the rate of 90 cents for every proof gallon: *Provided*, That the actual product shall be assumed to be in no case less than 80 per centum of the producing capacity of the distillery as estimated according to law. * * *

Section 3310 provides that—

Every distiller at the hour of twelve meridian on the third day after that on which his bond is approved, shall be deemed to have commenced, and thereafter to be continuously engaged in, the production of distilled spirits in his distillery, except in the intervals when he shall suspend work as hereinafter provided. * * *

Section 3311 provides that—

Whenever any distiller desires to reduce the producing capacity of his distillery, he shall give notice of such intention in writing to the collector, stating

> the quantity of spirits which he desires thereafter to manufacture or produce every twenty-four hours, and thereupon said collector shall proceed, at the expense of the distiller, to reduce and limit the producing capacity of the distillery to the quantity stated in said notice, by placing upon a sufficient number of the fermenting tubs close-fitting covers, which shall be securely fastened by nails, seals, and otherwise, and in such manner as to prevent the use of such tubs without removing said covers or breaking said seals, and shall adopt such other precautions as may be prescribed by the Commissioner of Internal Revenue to reduce the capacity of said distillery. * * *

It appears from the foregoing sections that the scheme for the protection of the Government from fraud, and to enable its officers to exercise complete supervision and control over the operations of the distilleries, so as to prevent the manufacture of any distilled spirits without the payment of tax, requires, first, an accurate survey of all the machinery of the distillery, including the fermenting tubs, and a certificate by the distiller of the true daily distilling capacity of his distillery, an examination by the Government officers to determine the correctness of this survey, and to decide conclusively upon the true distilling capacity per day. Section 3264 provides that the collector and his designated assistant shall proceed "to make a survey of such distillery for the purpose of estimating and determining its true spirit-producing capacity for a day of twenty-four hours." This is an estimate for one day, not for several different days of a series. The day is made the unit, and capacity must be reduced. Such has been the holding of the Revenue Department since its organization,

and such is the plain requirement of the section. Section 3309 refers to that daily capacity so fixed when it says that the calculation of excess of grain used shall be based upon "the capacity of the distillery as estimated according to law."

The capacity is estimated by fermenting tubs. The distiller is permitted to allow his mash to ferment for seventy-two hours. The daily spirit-producing capacity, therefore, of a single tub can only be reached by taking the spirits produced after a fermentation lasting three days, and dividing it by 3. It is impossible to reach theresult in any other way. The law fixes the unit of capacity as a day's production, and it reduces capacity by closing fermenting tubs. (Section 3311.) Capacity, therefore, is determined by fermenting tubs—those which are left open, and in no other way can the daily capacity of a distillery be reached than by taking all the fermenting tubs which are open and dividing their producing capacity through the whole fermenting period by the number of days of that period. This was the course taken in the case at bar.

On or after the 22d of September, the number of tubs which were open was 8. They continued to be open from that time until after the 30th of September. With 8 tubs open, and three days for a fermenting period, the daily capacity of the distillery under these circumstances was necessarily $2\frac{2}{3}$ tubs per day. The law, by graduating the capacity according to the number of tubs open, and by requiring that capacity to be based upon a daily production, prevents any other result. With 8 tubs open all the time, and with no change in capacity whatever, the

spirit-producing capacity of the distillery per day can not in law be regarded as anything but one-third of the whole number of tubs open.

No trouble arises in averaging the capacity for the whole fermenting period where the number of tubs in use is not divisible by three, except at the end of the calendar month. Sections 3307 and 3309 make the month the period of calculation. The right of the distiller to use the tubs open to their full working capacity is qualified by section 3264 in making one day the unit of time of production, and one month the arbitrary period for calculation. The distiller must govern himself accordingly. If this is a Procrustean bed, the law makes it.

In the case at bar, the distiller knew that the number of days in the month upon which the calculation must be made, based upon his daily producing capacity, was limited to two, and that if he produced more than his average daily capacity on the first two days he exposed himself to an assessment. It is said that he has the right, when the tubs are open, to use them to their full capacity. He has not such right if by so using them he exceeds the daily capacity fixed by law and under the law.

Wherein did the Commissioner of Internal Revenue depart from the law in fixing the daily capacity at $2\frac{2}{3}$ tubs, where 8 tubs are open? The law required him to fix a daily capacity—required him to base that capacity upon the number of tubs which were open after they had remained open for one fermenting period. How could he fix a daily capacity except by determining what those 8 tubs would produce by the number of days in the ferment-

ing period? The claim on behalf of the defendant in error here is substantially this:

It is true 8 tubs were open. It is true that the capacity for three days was eight times the cubic contents of 1 tub reduced to bushels of grain; but we claim that the producing capacity of that distillery on the first day was 3 tubs, on the second day was 3 tubs, and on the third day was 2 tubs.

In other words, while no reduction of the capacity was made, while no tubs were closed for which tubs of equal size were not opened, while under the law the capacity remained the same for each day, it was the duty of the Commissioner, without the closing of any tubs whatever, to give a different capacity for two of the days of the fermenting period from the third. This, in view of the provisions of sections 3264 and 3311, it is submitted can not be done.

There is nothing in the law which prevents a distiller, if he choose, from fermenting a less period than seventy-two hours. (Sec. 3285, 21 Stat. L., 145.) Suppose that instead of waiting until the third day for the fermenting of the 2 tubs which he did distill on the 1st of October, he had distilled them on the 30th of September. Then we should have had of grain used on the 30th of September, 5 tubs, and 3 tubs on the 29th, making in all 8 tubs for two days. Would it then, under these circumstances, be the duty of the Commissioner of Internal Revenue to hold that the producing capacity of the distillery on the 29th of September was 3 tubs, on the 30th of September was 5 tubs, and on the 1st of October was no tubs, although,

as a matter of fact during the three days, 8 tubs were open, and there had been no reduction in capacity under section 3311.

It is to be noted that the calculation of the collector and commissioner for this excess was based on the official survey which fixed the daily producing capacity of the distillery at 146.15 bushels of grain per open tub. This appears in paragraph two of the agreed statement (Rec., p. 13). This survey of daily capacity is conclusive on the distiller. (*United States* vs. *Ferrary*, 93 U. S., 625; *Wright* vs. *United States*, 108 U. S., 281.) How, then, can the distiller dispute a result based on the survey?

The supposititious case presented by counsel for the plaintiff in error does not produce any absurdity at all. He supposes that a distillery has but 1 tub of 300 bushels capacity, and that this tub is opened on the 26th of September. The fermenting period being three days, a Sunday intervening, the distiller does not distill until the 30th. The capacity is not increased under the law until the 30th of September. Upon that day his daily capacity is increased not 300 bushels, but 100 bushels, and if he distills upon that day he distills and uses 300 bushels, which makes an excess of grain used 200 bushels. That is true, and he is liable under the law for such excess. He must be. It was his duty not to distill under these circumstances. The daily capacity of the distillery for the 30th of September was not 300 bushels. He added to the capacity of the distillery 1 tub. That 1 tub could ferment only in three days. If that remained the only tub open in the distillery, and representing the entire

capacity of the distillery, the producing capacity of the distillery per day was one-third of its cubic contents reduced to bushels of grain. This is said to be an arbitrary and fictitious calculation. If so, the arbitrary features of the calculation are found in the law and not in the regulations or the calculations made by the Internal-Revenue Bureau.

The law requires that the capacity of the distillery should be reduced to one day of twenty-four hours, not to three days, not to the full fermenting period; but to one day of twenty-four hours; and in no other way can that be reached except by averaging the producing capacity for three days and dividing by the number of days. The law further provides that the distiller shall make his return for every calendar month. We have then an arbitrary standard of daily capacity, and a period for calculation of the number of days in a month. These two are prescribed by the law. If they are arbitrary, it is a sufficient answer to say that Congress has fixed them, and the distiller must conform to those bases of calculation in the conduct of his distillery. They are just as much a part of the law as the provisions requiring that he shall pay tax on any excess of his capacity, and they enter into the calculation of that excess, for that excess is based on the estimate of his capacity according to law.

Reliance is had on *Weitzel* vs. *Rabe* (103 U. S. R., 340). In that case it was held that under section 3311 the producing capacity of a distillery was not decreased by closing tubs until sufficient time had elapsed after closing the tubs to enable the product thereof to be distilled. This was a construction of section 3311 and simply de-

termined that producing capacity was neither increased or reduced by opening or closing tubs until the spirit product could be affected by the change, *i. e.*, after the fermenting period. That was a case of change in capacity by closing tubs. Here there was no change in capacity. The number of tubs open continued exactly the same. The decision in the Rabe case, therefore, is of no assistance.

OPERATIONS OF DISTILLERY IN DETAIL.

What has been said states the position of the defendant in error without examining the details of the tabular statements and of circular No. 238. It is thought proper, however, to submit also a somewhat more detailed consideration of the particular case in hand, prepared in the Internal Revenue Department.

The daily capacity of the distillery prior to and at the beginning of the month of September, 1885, was 876.93 bushels (six tubs being in use), which remained unchanged until the distiller gave a notice and had two tubs opened and two closed on the 1st, two opened and two closed on the 2d, and three opened and two closed on the 3d, the net result of which was to open for use an additional tub, and so increase the capacity by the daily capacity of one tub on the 4th, which was at the end of one fermenting period after the first tubs were opened and closed. The capacity thus became on the 4th 1,023.08 bushels, seven tubs being in use, and so continued until the distillers gave a notice and had three tubs opened and two closed on the 8th, three opened and two closed on the 9th, and three opened and three closed on the 10th, the net result of which was

open for use two additional tubs, and so increase the capacity by the daily capacity of two tubs on the 11th, which was at the end of one fermenting period after the first tubs were opened and closed.

The capacity thus became on the 11th 1,315.39 bushels (nine tubs in use), and so continued until the distillers gave notice and had three tubs opened and three tubs closed on the 18th, three opened and three closed on the 19th, and two opened and three closed on the 21st, the net result of which was to deprive the distillers of the use of one tub, and so reduce the capacity by the daily capacity of one tub on the 22d, which was at the end of one fermenting period after the first tubs were opened and closed. The capacity thus became on the 22d 1,169.24 bushels (eight tubs in use), and so continued until the end of the month.

The capacity of the distillery for the twenty-six working days of the month was, therefore, as follows:

1st to 3d, inclusive, three days, at 876.93, equals	2,630.79
4th to 10th, inclusive, six days, at 1,023.08, equals	6,138.48
11th to 21st, inclusive, nine days, at 1,315.39, equals	11,838.51
22d to 30th, inclusive, eight days, at 1,169.24, equals	9,353.92
Total capacity for month	29,961.70
The bushels of grain distilled	30,256.50
Excess of grain over capacity	294.80

There were actually but three changes made in the capacity of the distillery during the month, six tubs being in use from the 1st to 3d, inclusive, seven tubs being in use from the 4th to 10th, nine tubs being in use from the 11th to 21st, eight tubs being in use from the 22d to 30th.

The daily capacity, stated in tubs and fractions of a tub and in bushels of grain, was as follows, being one-third of the number and of the working capacity of tubs in use:

Two tubs (876.93 bushels) from 1st to 3d, inclusive; two and one-third tubs (1,023.08 bushels) from 4th to 10th; three tubs (1,315.39 bushels) from 11th to 21st; two and two-thirds tubs (1,169.24 bushels) from 22d to 30th.

Each of the changes in capacity was made upon due notice and followed strictly the rule laid down in circular No. 238, as to the time of taking effect.

In the following statement a comparison is made between the quantity of grain distilled under each of the four capacities as above stated.

	Grain distilled.	Capacity.	Excess.
	Bushels.	*Bushels.*	*Bushels.*
1st to 3d, inclusive	2,631	2,630.79	.21
4th to 10th, inclusive	6,139	6,138.48	.52
11th to 21st, inclusive	11,839.50	11,838.51	.99
22d to 30th, inclusive	9,647	9,353.92	293.08
Total	30,256.50	29,961.70	294.80

Under the first capacity, from the 1st to the 3d of the month, inclusive, there was a small excess in the use of materials, due to the fact that the distillers actually put a fractional part of a bushel in each tub at each filling in excess of its surveyed capacity.

Under the next capacity, from the 4th to the 10th, inclusive, there were seven tubs open each day, making the daily capacity two and one-third tubs, or 1,023.08 bushels. The tubs must be emptied entirely and the distiller can

not distill fractional parts of tubs, consequently on some days he used the contents of two tubs and on some days the contents of three, so that while operating under this capacity the quantity distilled each day did not correspond with the daily capacity. On the days during which he emptied and used the contents of two tubs he fell below the requisite capacity, and on the days when he used the contents of three tubs there was an excess, but taking the whole period together there was only a small excess due to the same cause as stated before, viz., a small overuse of grain each time a tub was filled.

From the 11th to the 21st of the month, inclusive, there were nine tubs in use and the small excess during this period was due to the same cause.

The working capacity of each tub, as fixed by the survey, was 438.46 bushels; while the quantity used each time a tub was emptied was 438.50 bushels.

From the 21st to the end of the month there were eight tubs in use. The excess for which the assessment was made occurred mainly under this capacity, and except a small fraction was due to the fact that the number of tubs in use (eight) could not be divided into sets, each containing the same number of tubs.

When the fermenting period in a distillery is three days there will be three sets of tubs in use, one set being emptied and distilled each day. When the number of tubs used are not divisible into sets containing the same number of tubs, so that the same number will be distilled each day, on no day will the quantity distilled correspond with the daily capacity and unless each set of tubs is distilled the same number of times (which can only be when the

time is divisible into one or more complete fermenting periods) the total grain distilled will either exceed or fall below the aggregate capacity.

Dividing the month in question into periods of three days each, corresponding with the fermenting period used and comparing the materials used in each of such periods with the capacity for the corresponding periods, it will be seen that all of the excess but 2.28 bushels occurred on the last two days of the month, on each of which days the beer of three tubs was distilled while the daily capacity was equal to two tubs and two-thirds of a tub.

THE QUESTION NARROWED DOWN TO THE DISTILLATIONS OF SEPTEMBER 29 AND 30.

The plaintiff in his brief (p. 3) states that the distillations of every day in the month down to and including September 29 may be disregarded, because it is admitted that down to that time the Government estimate of grain capacity was 27,623.22 bushels, while the quantity actually used was but 27,625.50 bushels, "the difference, 2.28 bushels, being the sum of several unconsidered and inconsiderable fractions."

The same rule of computation was, of course, in force during the other days of the month, but its application on those days gives no occasion for complaint, but its application on the last two days of the month causes the charge that it is "inconsistent with law," "arbitrary," "unreasonable."

The capacity of the distillery for each of these days, September 29 and 30, ascertained as before stated, was 1,169.24 bushels or that of eight tubs, the number open and

in use. The distiller distilled September 29 the contents of tubs Nos. 11, 12, and 13, filled September 25; and maintains that the capacity was 1,315.50 bushels, or the contents of the three tubs, and on the 30th he distilled the contents of tubs Nos. 14, 15, and 1, filled September 26, and maintains that the capacity that day was 1,315.50 bushels, or the contents of the three tubs, each tub having a capacity of 438.46 bushels.

The distiller maintains (p. 7 of his brief) that the capacity of his distillery on any given day must be either the capacity of one tub, 438.46 bushels, or two tubs, 876.93 bushels, or three tubs, 1,315.39 bushels, or some multiple of the contents of one tub, and that it could not be in any supposable case 1,169.24 bushels, as set up by the Government.

1,169.24 is a multiple of the *daily* capacity of eight tubs, the number in use. The capacity of a distillery for any given day is determined by the survey and not by the quantity of grain distilled on that day, or by the capacity of the tubs whose contents may have been distilled on that day.

In making this survey every fermenting tub is measured, and the exact quantity of grain that can be put into each tub is fixed absolutely under that survey; but, inasmuch as under section 3285, Revised Statutes, as amended by act of May 28, 1880 (21 Stat, 145), the fermenting tubs could be filled once, and no more, in seventy-two hours (three days), the average or daily capacity of one tub is one-third the quantity that can be put into that tub at one filling.

What is true of one tub is true of all the tubs in the distillery, so that the average or daily capacity of the distillery is nothing more than the aggregate of the average or daily capacities of *all* the tubs.

Closing a portion of the tubs thus surveyed simply withdraws from the total surveyed capacity of the distillery the aggregate of the daily capacities of the tubs closed, and the capacity thus becomes just what it would be under a resurvey made only of the tubs remaining open.

The capacity of the distillery for any day, whether of a portion or all of the tubs, is what the survey makes it, and is not a theory, a fiction, or a result from a method of keeping accounts.

In this case there was no change in the capacity of the distillery after September 22, when eight tubs were open and in use, and the capacity continued to be that of eight tubs throughout the remainder of the month.

The capacity on the 29th and 30th of September must, therefore, be just what it had been on and after the 22d, or that of eight tubs. Now, the capacity of eight tubs for a day of twenty-four hours was 1,169.24 bushels, as established by the survey by which both the Government and distillers are bound.

The objection to the method of computation desired by the distiller is that it entirely abandons the survey and resorts to an estimate "at variance with the survey and contrary to law."

The Government does not maintain that the capacity of *tubs* 11, 12, and 13, distilled on the 29th, was 1,169.24 bushels, and that the capacity of *tubs* 13, 14, and one dis-

tilled on the 30th was 1,169.24 bushels, but it does maintain that the daily capacity of the *eight tubs then open* was 1,169.24 bushels.

Suppose that on the 29th of September all the tubs then closed had been removed, and a survey had been made of only the eight tubs then open, what would have been capacity for that day?

With the same measurements and the same strength of beer it would have been 1,169.24, and consequently the same for the next day.

Suppose the distiller, on the 29th, had distilled the three tubs he did distill, together with the three he distilled on the 30th, and distilled nothing on the 30th (which he had a perfect right to do), what would have been the capacity for the 29th and what for the 30th?

According to the distiller's claim, it would have been 2,631 bushels on the 29th, and to be consistent, he must say that it would have been *nothing* on the 30th, as no tubs were distilled on that day.

That is, a distiller can, by simply omitting to distill on any day, extinguish his capacity for that day. A distiller's liability under the survey continues, as the law provides, from the last day of the first fermenting period until locks are affixed to the furnace doors under a notice of suspension. Section 3310, Revised Statutes, as amended by section 7, act of May 28, 1880 (21 Stat., 145).

The position of the Government with respect to the case is that the capacity was fixed by the survey and could not be varied by what the distiller did, but was the same whether the distiller distilled one tub or eight tubs

or nothing on any given day. He distilled three tubs on the 29th and three tubs on the 30th, but that did not determine the daily capacity of the distillery, which, as long as he had eight tubs open, was 1,169.24 bushels, as fixed by the survey.

With respect to circular No. 238 it should be said that this circular was issued in order to make the practice of the Internal Revenue office conform to the decision in *Weitzel* vs. *Rabe*.

The rule, before this decision, was that when a tub was closed, thus reducing capacity of the distillery, the reduction took effect from date of closing, and therefore the distiller was not allowed time to run off his mash. Where the capacity was increased by opening tubs the capacity took effect at the end of the fermenting period.

The rule was changed by circular No. 238, so that the fermenting period is allowed in both cases, whether the tubs are closed, reducing the capacity, or opened, increasing the capacity, as the reasoning of the court was considered applicable alike to both classes of changes.

The decision in *Weitzel* vs. *Rabe*, upon which the plaintiff depends so largely, is then simply this, that the daily capacity is not affected till the end of one fermenting period has been reached, and this principle is embodied in that circular.

But the plaintiff misapprehends the effect of the circular, and his argument relative to it is irrelevant. That circular did not affect the capacity of the distillery for the last two days of the month as alleged. The capacity of the distillery would have been 1,169.24 bushels on those days if that circular had not been promulgated.

The only change circular 238 made in the method of calculating capacity was in regard to the time when a change in capacity resulting from opening or closing tubs took effect. There was no such change during those days, as the capacity remained the same on and after the 22d. The capacity as estimated for the last two days of the month was what the *survey* made it instead of what circular No. 238 made it.

It is respectfully submitted that the judgment of the court below should be affirmed.

WM. H. TAFT,
Solicitor-General.

No. 369 Martin v Barlow p 172

NORTH BORDER ST.

BLOOM ST.

ORIOLE ST.

GLEN ST.

RAMBLE ST.

QUARRY ST.

FOUNTAIN ST.

RESERVE AVE.

192

193

194

156

157

151

159

NORTH MOUNTAIN

228.74 Acres

HOT SPRINGS MOUNTAIN RESERVATION

264.832 ACRES.

D

SE¼ SEC. 28
T. 2 S. R. 19 W.
Divisional Plat.

Aaron H. Cragin
John Gobern
Wm. F. Coates
Hot Springs Commissioners.

U.S. LAND OFFICE, Little Rock Ark March 2. 1886

I, Robt. V. Yeakle, Register of the above Office, hereby certify that the above and foregoing is a true and correct tracing of Divisional plan or map "D", of the Hot Springs (U.S.) Reservation, in the STATE of ARKANSAS, as surveyed and laid out according to Acts of Congress, approved, March 3. 1877 and Dec 16. 1878, as the same now appears on file in this Office, it being a part of the archives thereof and of which I am the legal custodian.

In Testimony Whereof, I have hereunto set my hand as such Register, the date first above.

Robt. V. Yeakle
Register

A 9

66

A true copy of a Manuscript marked A and entitled
New Orleans June 30th 1803
Arthur de Ames
Deputy City Surveyor

No. 1104
City of New Orleans } p. 66
Le Con Duchesne Cl. Ct.

(1728.)

PLAN DE LA NOUVELLE ORLEANS, COMME ETELLE ETAIT EN MAI 1728.

Levé et Dessiné par ordre de Mr. Boisbriant Commandant pour le Roy aux Illinois par le Sr. Pauger Ingenieur ordinaire de la Marine

Le tout reduit par Copie par moy Ingenieur, Garde de la Carte et Plan de la Nouvelle Orleans le 3 Mars 1728
Pour copie Conforme
Le Vice amiral de France Bruix

Pour copie conforme
Le Chr. de Clerel de Tocqueville
Paris 22 Novembre 1810

2179? Le Ministre des Affaires Etrangères a mis en cette Bibliotheque en Mr. Gauvilliers Secretaire general au Ministere
Paris Ce 3 Decembre 1819
Pour extrait conforme au Manuscrit
Le Maître des requetes Chr. de la Chevallerie
Paris Ce Meme Jour
Le secretaire Redacteur de la section de Legislation
Comte Brule

Vu pour la Legalisation de la signature de Mr. le Comte de Chevallerie Conseiller d'Etat Directeur general des Ponts et Chaussées et Plans de la Marine et des Colonies
Paris le 13 Decembre 1819
Pour le Ministre Secretaire d'Etat de la Marine et des Colonies
Le secretaire general du Ministere
N. Vanvilliers

Be it known that the United states of America Paris I James Cox Barnes Consul of the United States of America for the Paris arond e claims do hereby certify that the above signature and seal to the Mr. Brevet matter Requests Charles the Chauvet, the Conseiller of State and Director of the Bridges and Causeways and Plans of the Marine and Colonies of his Majesty the King of the United Kingdom of France, Count Brule Chevr & the Passport and Legislation thereof, the same Department and that is attach to them so signed & executed are duly authenticated and entitled to full faith and credit as well in Court as out of Court.
In testimony whereof I have hereunto set my hand and affixed my official seal at my office in Paris this 13 December 1819 in the year of our Lord and of the Independence of the United States
Signed J. Cox Barnes
Consul U.S.

LEGENDE

Eglise
Presbytere
Casernes des Soldats, Canons de bronze
Jurisdiction
Grand Magazin
Magasin des Effets de Munitions
Magasin des Vivres
Boucherie
Corps de Garde
Prison
Loges de la Compagnie
Hôtel de la Marine
Magasin des Outils, Magasin à vivres
ou de Depositaire
Magasin à goudron
Moulin
Loterie
Maisons appartenant à la Compagnie
Hôtel de Mr. Benville
Terrain de Magasins Général
... de Mr. Beaugeville
... de Mr. de Chavannes
... de S. Denis
... de Pradel
Rue ou Chemin allant de la Concession de Mr. de Lusser
... de S. Guillaume
... de la Compagnie
14. ... de S. Valery
15. ... de S. Bernard de Neuville
16. ... de S. Pierre de Provence
17. ... de la Dame Françoise
18. ... de S. Quentin
19. ... de S. Barthelemy Chemin
20. ... de S. Ursin
21. ... de S. Antoine
22. Ville de Dijon, Maisons sises
à Mr. de S. Maria
en dit S. Ruby
en dit S. Dorlay
Fausse Garde
Corps de la Marine
Magasin des Effets appartenant
Direction
Terrains servant au cimetière actuel
Paroisse ou Eglise actuelle
Maisons des Prêtres
Terrain servant à bâtir Maisons
pour loger les Employés
Gouvernement
Maison de la Compagnie
des S. Velleux
... Perrault
à Mr. de Gauvaire
Velleux
Velleux
à Mr. de Ruby et Associés
à Mr. Darlequeville
des Sr. Pazon
des S. Agard
à la Compagnie
à Pagnolet
Terrain destiné pour le cimetière
des Sr. Tisserand
des Jesuites
de la Compagnie à Pagnet
au Sr. Diolaine
des Srs. Du Morand
des Srs. Mitte
à Mr. Hamon
des S. Morineau
des Sr. Verdonnet
à Mr. Brule
à la Compagnie
des Sr. Marigault
à Mr. Brule
à la Compagnie à Mr. Paris
à S. Melaine
à la Charbaye
à la Sr. Dufresne
des S. Velze
des Sr. Le Comte
des Sr. de la Croix
des S. Pauvert
des Sr. Roger
des Sr. Roger
à la Prairie
des Religieux Recollets
des S. Desclozeaux
Terrain des Sr. Delair
des Sr. Desclozeaux
des Sr. S. Pierre
des Sr. S. Amand
des Sr. Brisset Habitant
à Mr. de Beaune
à la Compagnie de Marine
des Chemins
à Mr. Michel
aux Sr. Auberon
dits Habitans ayant Obligation
à la Compagnie
des Sr. Rivard
à Mr. de Lusser
Corps de Garde
La Chapelle
à la Sr. Dufresne
à Mr. Le Sueur
des S. Pierre
des S. Pierre
des Sr. Pierre
des Sr. Pierre
des Sr

A true copy of a document
marked B. and entitled

New Orleans June 26th 1851

Arthur de Armas
Dpty City Surveyor

DEPUTY CITY SURVEYOR,
OFFICE, 67 ESPLN STREET.
New Orleans, La

Maps B
Compd
24 May
1 McHyman

PLAN

de la

VILLE et des FAUBOURGS incorporés de la NOUVELLE ORLEANS y compris les 600 verges de Communes et la proprietée acquise par la corporation de Mr Claude Trémé les dites communes divisées en terrains et lotis conformement a l'arrete du Conseil de ville en date du 20 Juin 1812. de dessus Mars et Aldermen de la N.O

par les Commissaires soussignés
Cyrille Tremoulet
Ecuyer Surveyor

I certify this plan to be a true and correct copy, as a reduced scale of the original plan on file in the office of the City Surveyor.
New Orleans August 19th 1858
Signed J. A. D'Hemecourt
City Surveyor

No. 1104.
City of New Orleans
vs
La Construction Co et al

} f. 67.

TERRES VACANTES

TERRES de Mr MARIGNY

TERRES Mr MARIGNY

FAUBOURG MARIGNY

HAB.ts D'JUNOIS

NOUVELLE ORLEANS

FAUBOURG MARIE

Batture du fauxbourg Ste Marie

MISSISSIPPI

Echelle de

31

A true Copy I a document marked A with B.C. and initialled

New Orleans June 26th 1858

Archives de France
Agent des Sceaux

PLAN de la NOUVELLE ORLEANS
telle qu'elle etait au mois de Decembre 1731.

Levé par Comchun

Pour Copy conforme.
Paris, le 15 Decembre 1847
Le Lieutenant-Colonel du Geme, directeur du Depot des Fortifications des Colonies (Signed) A. Simien

Vu pour legalisation de la signature de Mr le lieutenant Colonel du Geme Simien Directeur du Depot des fortifications des colonies au Ministere de la Marine, Paris le 15 Decembre 1847. Le Pair de France Ministre Secretaire d'Etat de la Marine et des Colonies Baron Le Ministre, et par son ordre, le Sous secretaire D'Etat Signed Jurien

MINISTERE DE LA MARINE ET DES COLONIES

Paris 27 December 1847
Legation of the United States
I certify that the above signature
Signed) Richard Rush.

LEGATION DES ETATS UNIS D'AMERIQUE en FRANCE

Les lignes rouges, mais quand la copie a été faite, marquent les separations qui devaient être faites. Celles qui sont lavées en rouge dans les isles, marquent les separations qui devaient être faites. Le fossé qui fait le tour de la ville avec quelques ouvrages commencés, et qui a 10 m 12 pouces depuis son fond jusqu'au dessus.
Les Magasins lavés de rouge sont voutés de brique. Ceux qui sont lavés en bleu sont de bois, charpentés, couverts de bardeaux, et ceux lavés de bleu sont des Baraques couvertes de cours de Sipre.

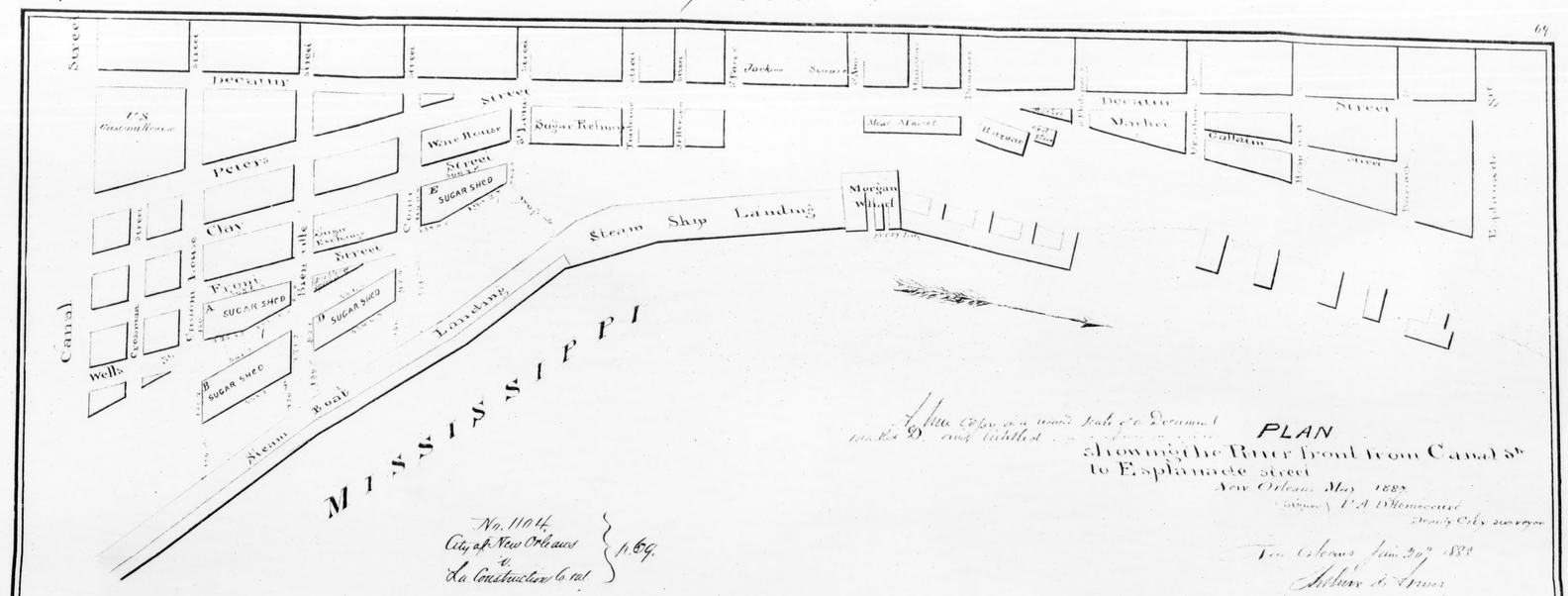
No. 1104.
Cat. of Nav Orleans } p. 68
et
La Construction Col.

Cimetiere
Retranchement
Chemin de Bons St Jean
Corps de Garde
Rue Bourbon
Rue Royale
Rue de Chartres
Place d'Armes
Quai
Quai
MISSISSIPI ou St LOUIS Fl.
Echelle de 100 toise

4

Filed with R.E.

64



PLAN
Showing the River front from Canal St to Esplanade street
New Orleans May 1888
(Signed) P. A. D'Hemecourt
Deputy City surveyor

No. 11014
City of New Orleans
vs.
La Constructions Co et al
} p. 69

New Orleans June 29th 1888
Arthur de Armas
Expert for Plaintiffs

DEPUTY CITY SURVEYOR,
OFFICE, 61 CARONDELET STREET,
New Orleans, La

51

Filed with R/E

DEPUTY CITY SURVEYOR
OFFICE, Broad & STREET
New Orleans, La

PETERS STREET

DECATUR STREET

CLAY STREET

FRONT STREET

EXCHANGE PLACE

RAIL

WELLS St

CROSSMAN St

CUSTOM HOUSE St

BIEN VENUE St

CANTY St

ST MARY St

LOUISIANA SUGAR REFINERY — Robert Carr & Co

SUGAR EXCHANGE — Delgado Bros — Philip Hirsch Company

U.S. BONDED WAREHOUSE

SUGAR SHED

SUGAR SHDD

TRACKS

CROMWELLS S.S. LINE

SUGAR LANDINGS

Wharf Level

Wharf Incline

MISSISSIPPI RIVER

A true Copy of a document filed and entd. this
New Orleans June 20th 1888
Arthur de Armas
Deputy City Surveyor

CHART
OF
SUGAR LANDING
showing locations of
SUGAR SHEDS, WHARVES & R.R. TRACKS.

No. 1104
City of New Orleans,
vs.
La. Construction Co. etal
fo. 140

Office of City Surveyor
New Orleans Dec 29th 1887
(Signed) D.M. Brosnan
City Surveyor

Reference
Morgan L.S. & T.R.R. tracks
L. & N. R.R. tracks

Scale
50 feet to one inch

[6]

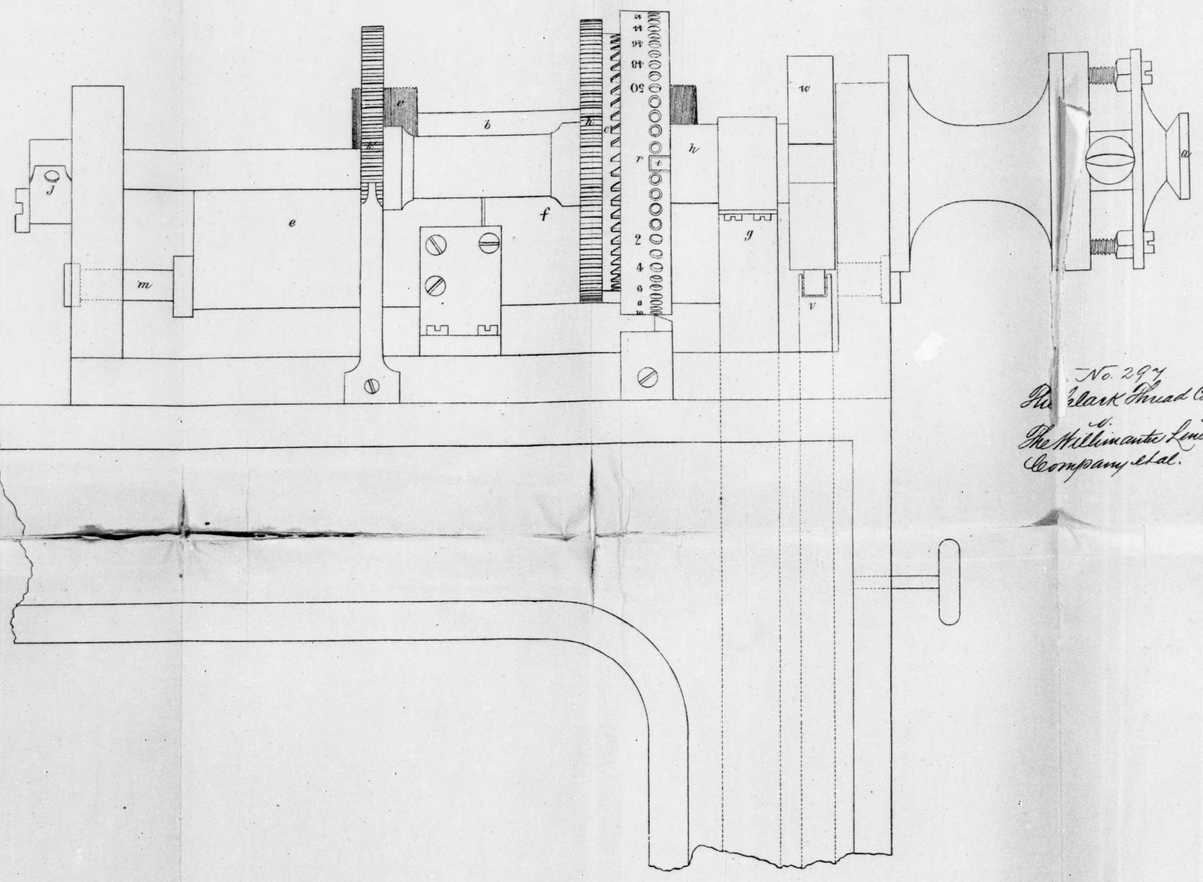
222½

(2 SHEETS.)
SHEET 1.

A. D. 1853. DECEMBER 14. N° 2901.
WIBBERLEY'S SPECIFICATION.

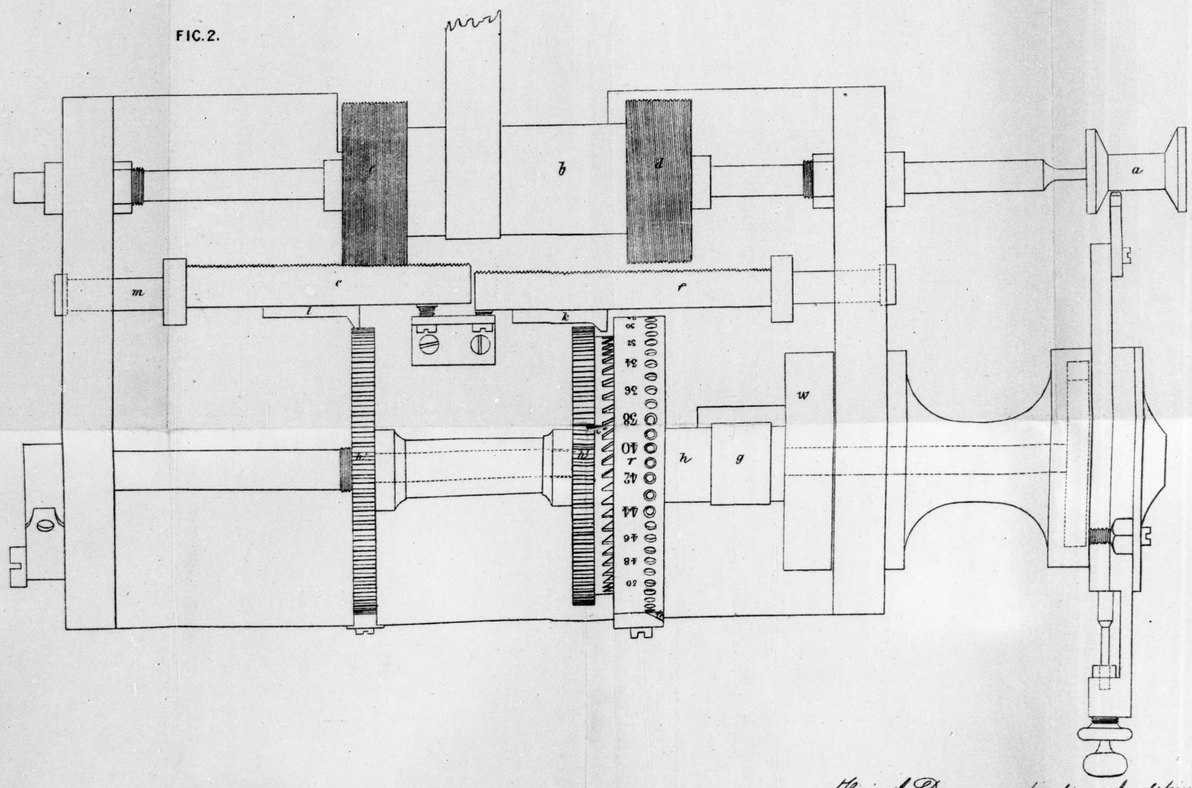
Exhibit Wibberley
N.E.W. Sx 2

FIG. 1.



No. 297
The Clark Thread Co.
v.
The Willimantic Linen Company et al.
p. 222½

FIG. 2.



Examined
P. Lucas
Asst. Clerk

The filed drawing is not colored

This is the Drawing mentioned or referred to in the accompanying Specification of John Wibberley No. 2901

John Davies
Agent to the Patentee

Walby & Sons, Lith.

32 3

Rec'd and filed Jan. 6/85

Rec'd & filed in new application May 2/59

No. 26,415.

No. 297 Clark Thread Co. Millmanticlewis Company stat. } p. 32 L.

Fig 6

Fig. 1.

Fig. 2.

Fig. 3.

Fig. 4.

Fig. 5.

Sheet. No. 1.

—H. Conant's Self-Acting Winding Machine, for spooling threads.—

Witnesses
F. L. Arnold
H. M. Arnold

Hezekiah Conant.

Fig. 1

Correctly attached
Arthur L. McIntire Dep. P. Off.

Fig 1

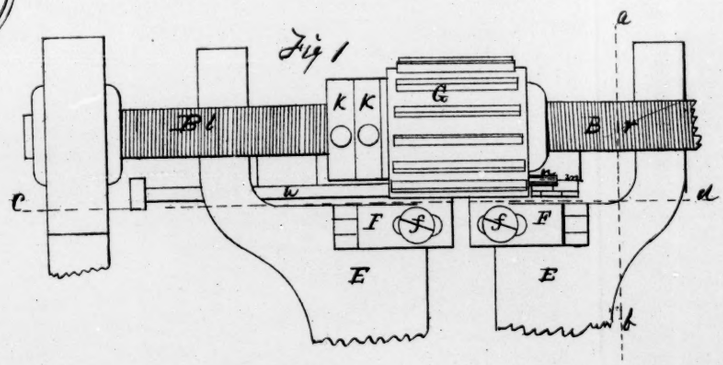


Fig 2

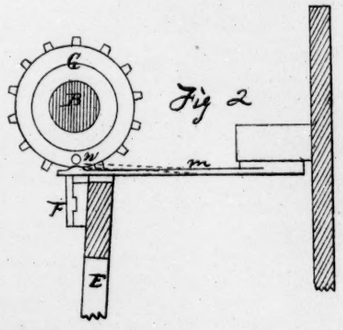
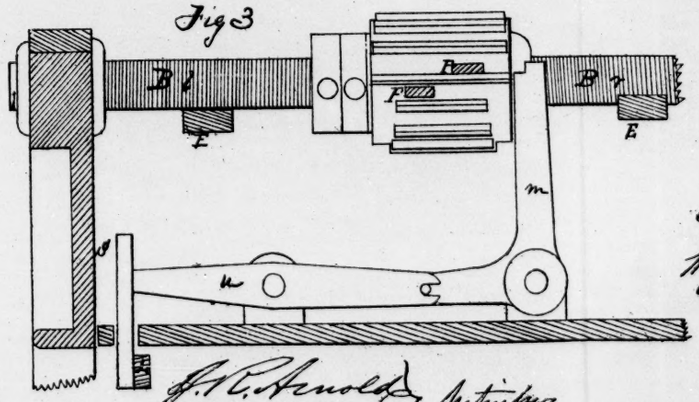


Fig 3



Sheet No. 2. H. Conant. self-acting Winding machine for Spooling Threads.

No. 297.
Clark Thread Co.
v.
Willimantic Linen Company et al
} p. 32a

Witnesses
J. C. Arnold
W. W. Arnold

Hezekiah Conant.

3

222 E

A. D. 1853. DECEMBER 14. Nº 2901.
WIBBERLEY'S SPECIFICATION.

(2 SHEETS)
SHEET 2

Exhibit - Mobberly
Mc W 52e

No 297
The Clark Thread Co.
The Willimantic Linen
Company et al
} A. 222 E

FIG. 1.

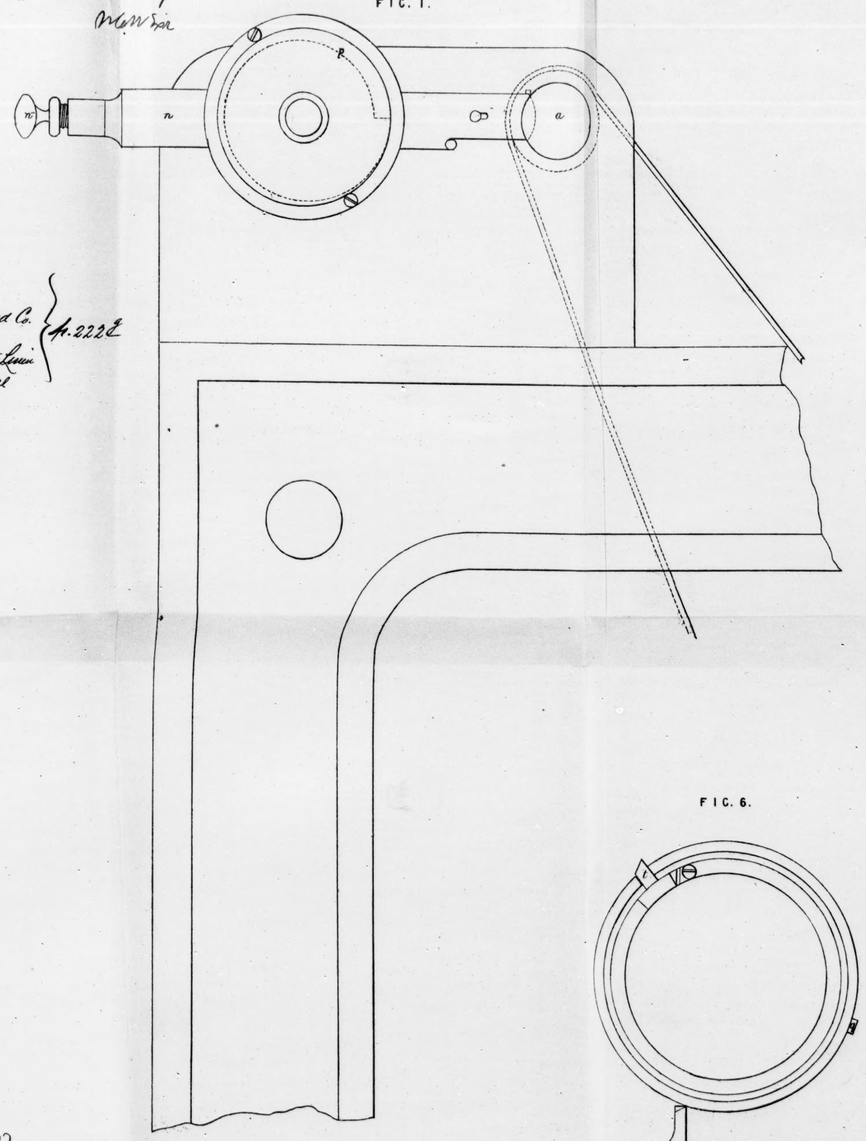


FIG. 2.

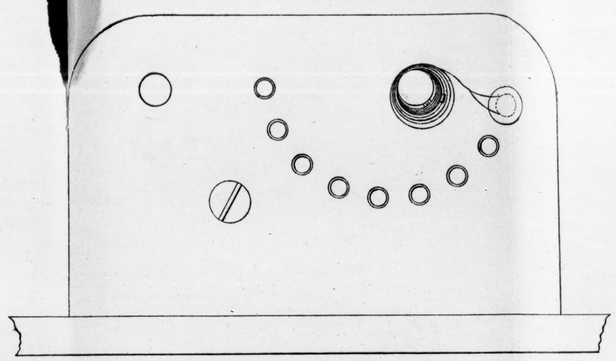


FIG. 5.

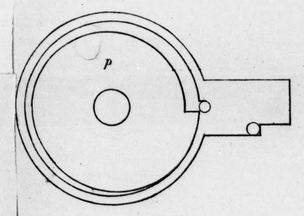


FIG. 3.

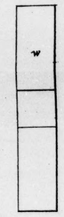


FIG. 4.

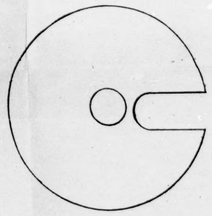


FIG. 6.

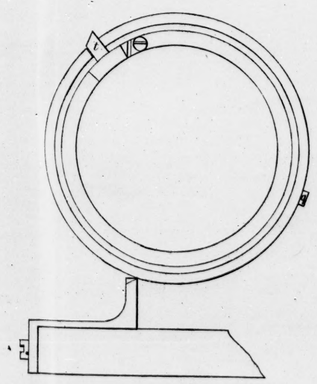


FIG. 7.

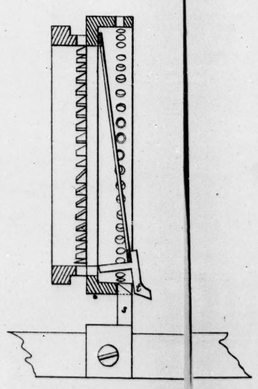
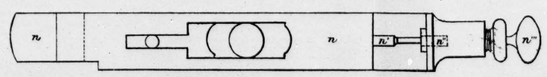


FIG. 8.



Examined from one of the filed drawings
R. F. Lucas
Asst. Examiner
J. J. Black
Asst. Examiner

The filed drawing is partly colored.

This is the Drawing mentioned or referred to in the accompanying Specification of John Wibberley Nº 2901.
John Davies
Agent to the Patentee

Malby & Sons, Lith.

4

A.D. 1848. Dec. 2. N° 12,353.
YOUNG'S Specification.
(2nd Edition)

(2 SHEETS)
SHEET 1

FIG. 1.

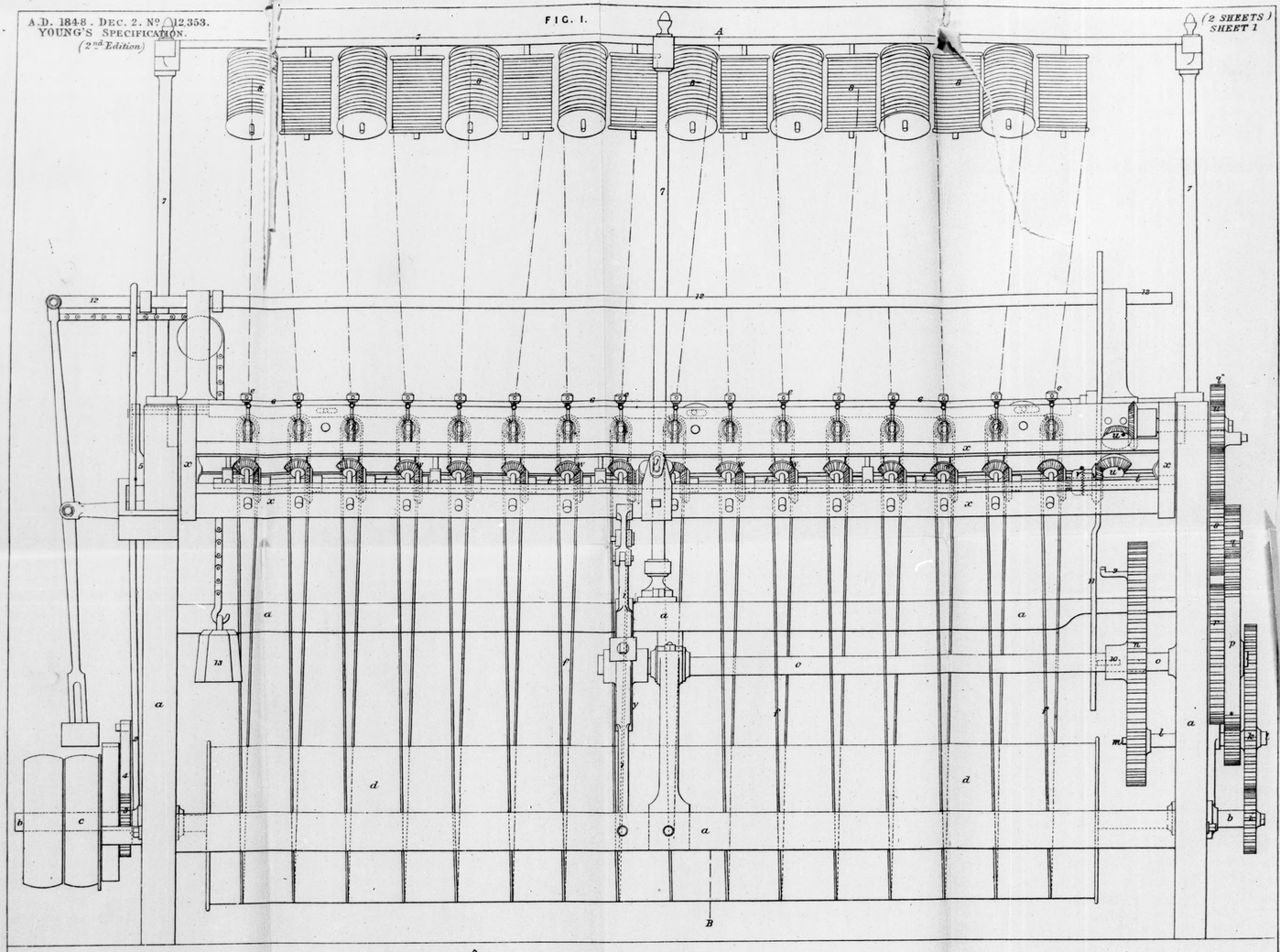


FIG. 4.

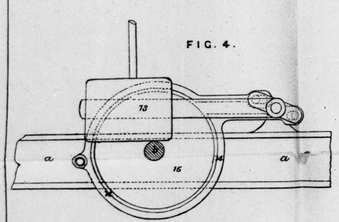


FIG. 5.

FIG. 2.

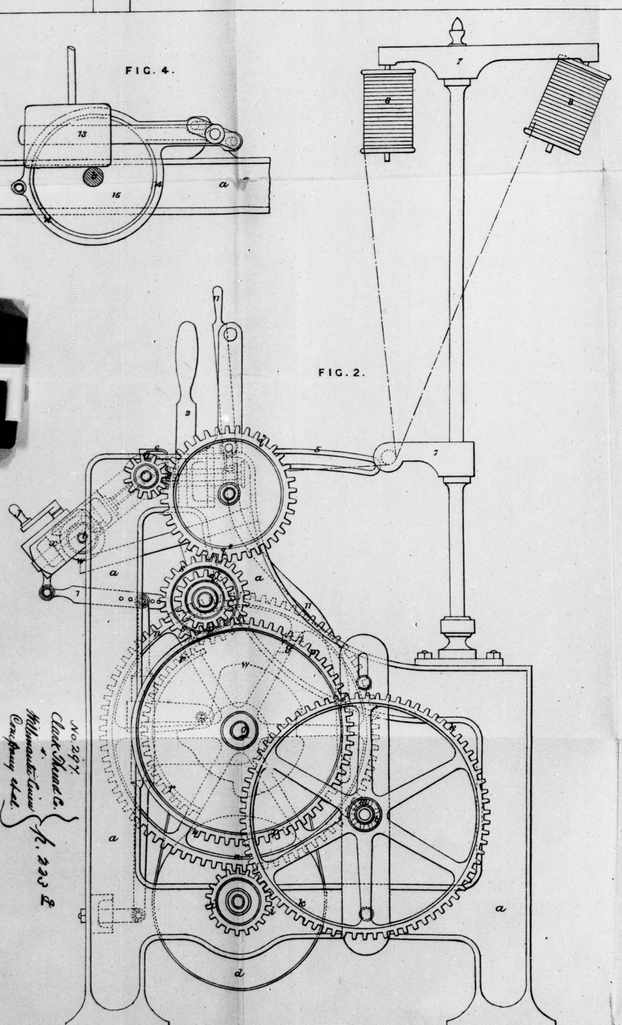


FIG. 3.

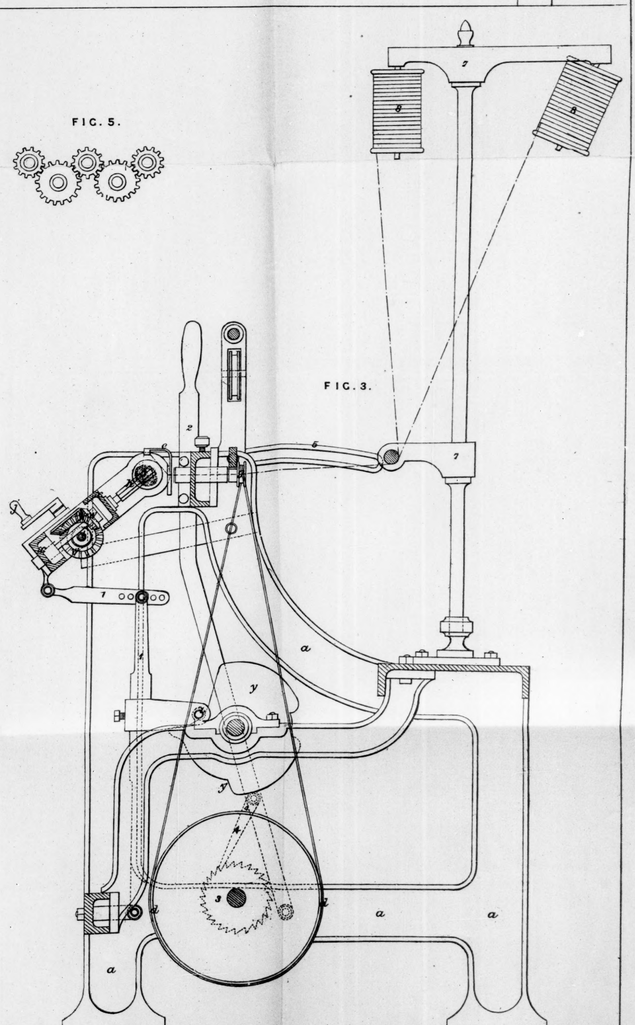


FIG. 6.

No. 2877
Chas. Mackie & Co.
Millwrights Iron
Engineers &c.

A. 223 a

The enrolled drawing is partly colored.

Drawn on Stone by Malby & Sons

A.D. 1848. DEC. 2. N°12.353.
YOUNG'S SPECIFICATION.
(2nd Edition)

(2 SHEETS)
SHEET 2

FIG. 1.

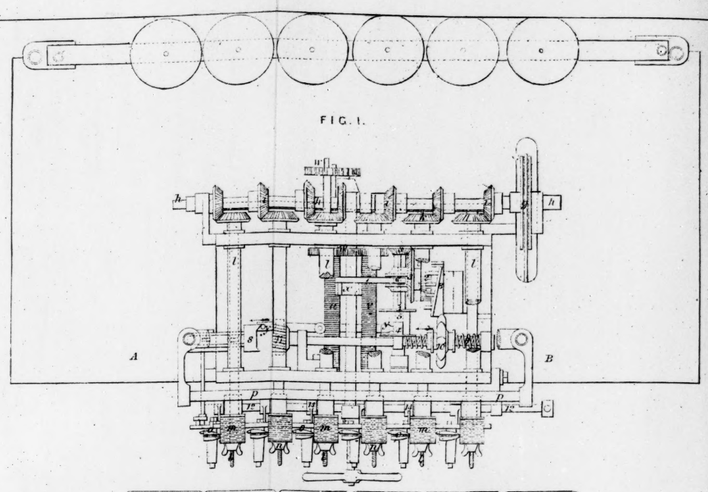


FIG. 2.

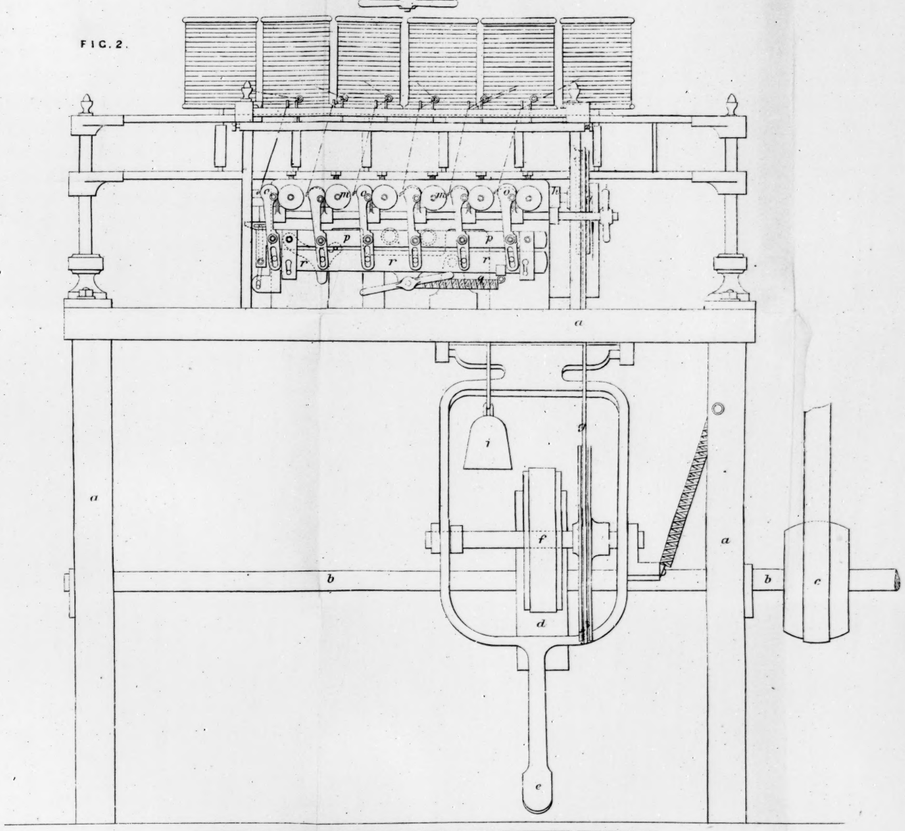
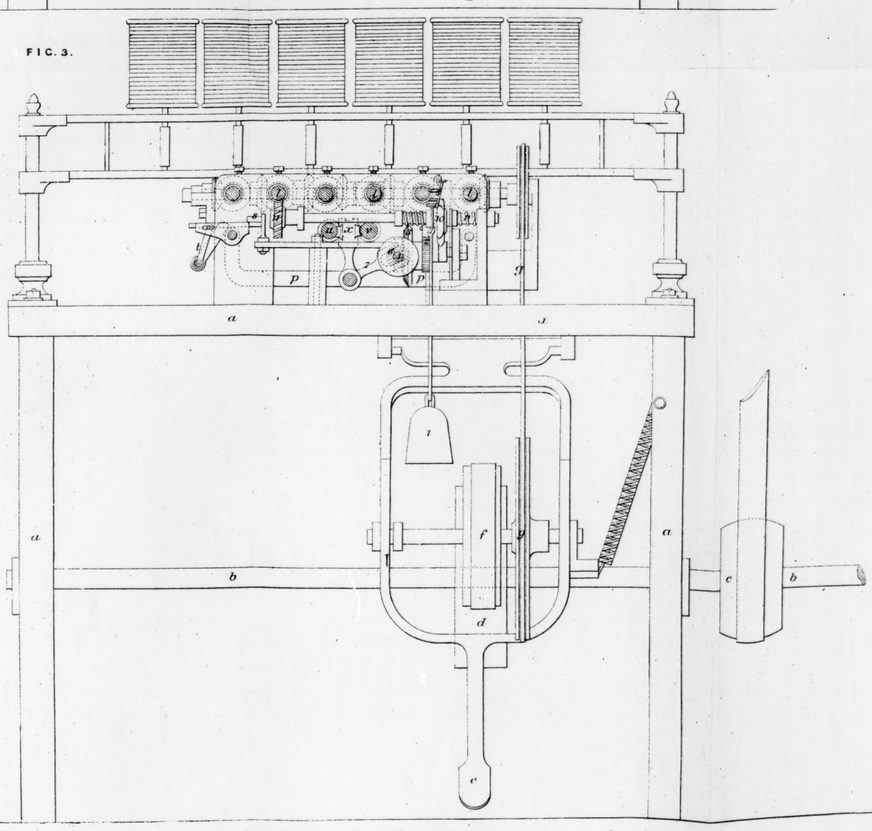


FIG. 3.



The enrolled drawing is partly colored.

LONDON Printed by GEORGE EDWARD EYRE and WILLIAM SPOTTISWOODE
Printers to the Queen's most Excellent Majesty 1872

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A.D. 1858. JANY. 22. Nº122.
WEILD'S SPECIFICATION.

(22 SHEETS)
SHEET 1.

FIG. 1.

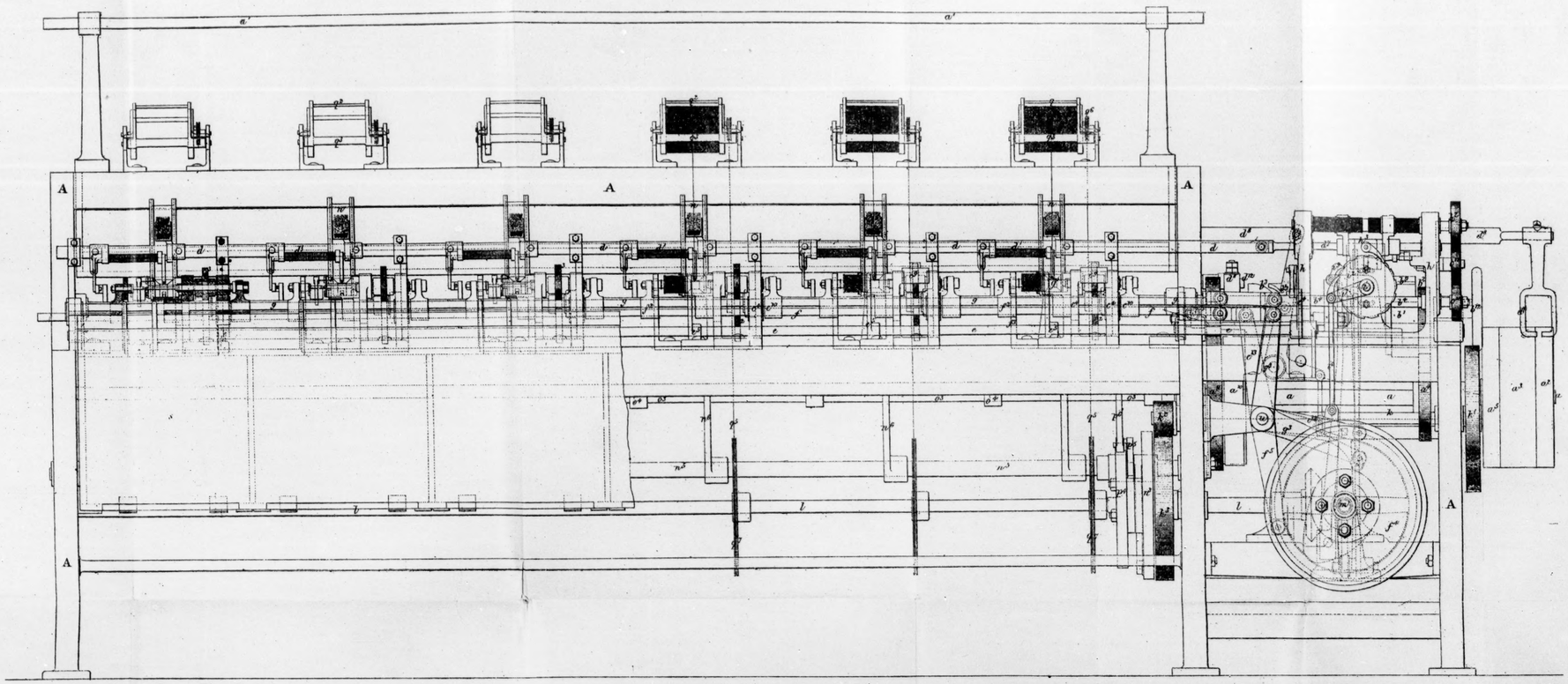
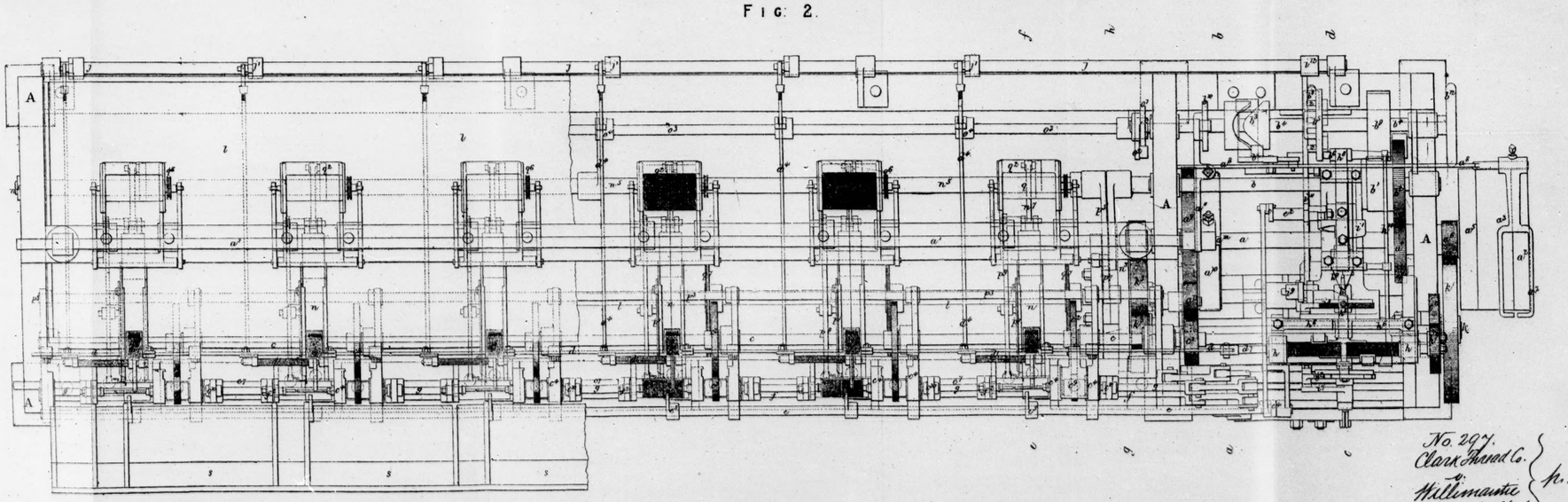


FIG. 2.



No. 297
Clark Thread Co.
v.
Willimantic
Linen Co et al.
p. 2214

The filed drawing is not colored.

Drawn on Stone by Malby & Sons

A.D. 1858. JANY. 22. Nº 122.

WEILD'S SPECIFICATION.

224 mm

(2 SHEETS)
SHEET 2

FIG: 3

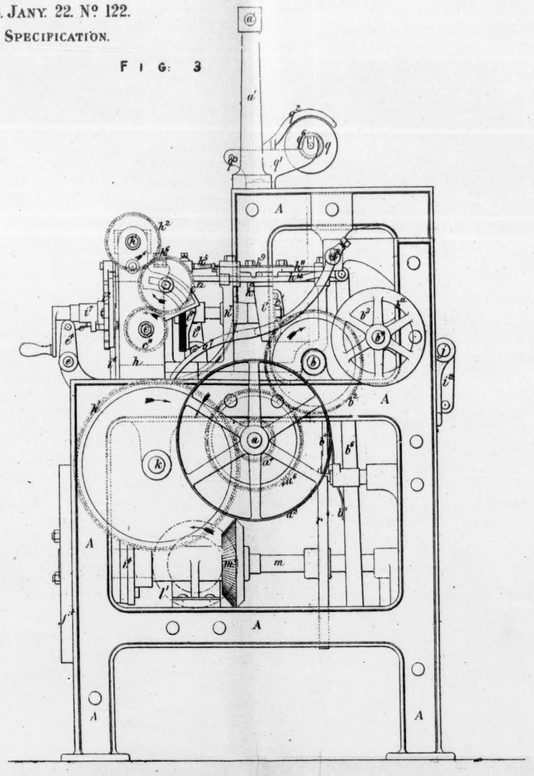


FIG: 5

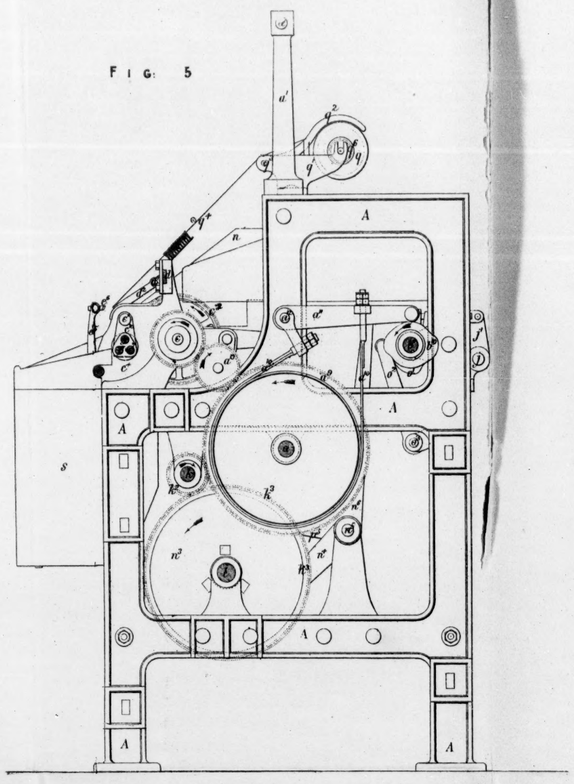


FIG: 4

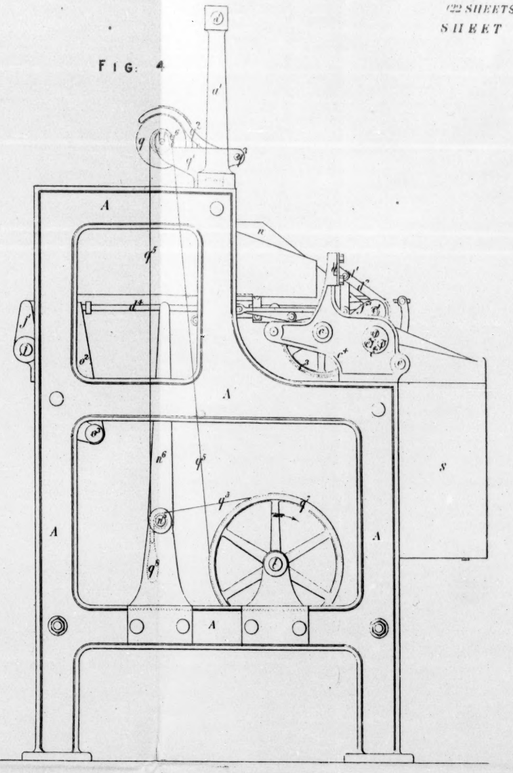


FIG: 6.

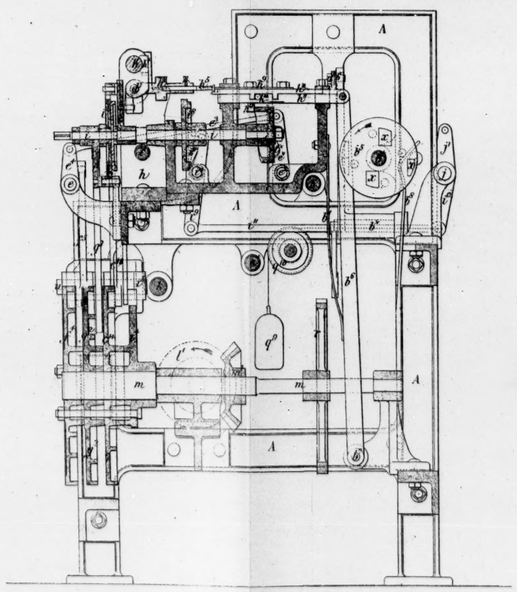


FIG: 7.

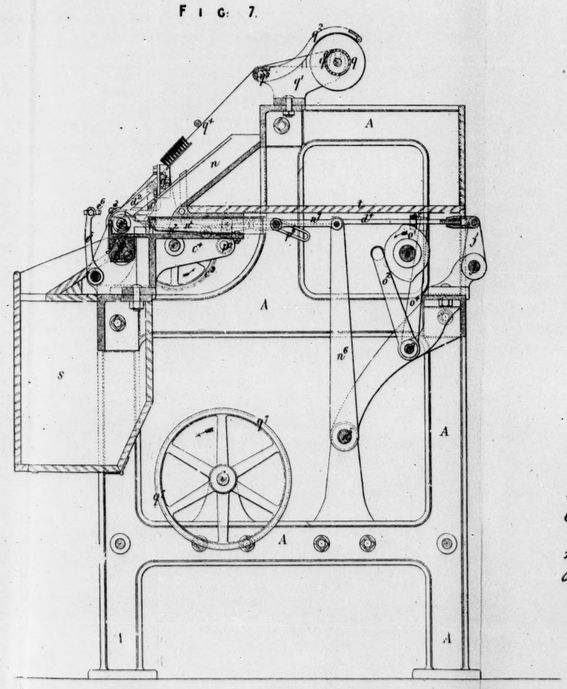
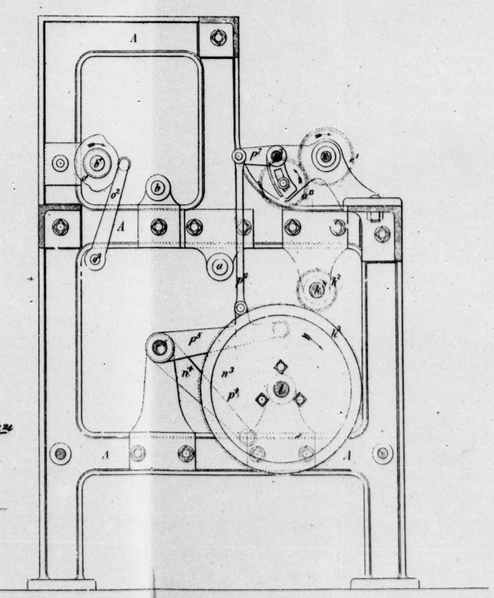


FIG: 8



No. 294.
Clark Thread Co.
Willimantic
Windham Co. Conn.

h. 224 mm

The filed drawing is not colored.

Drawn on Stone by Malley & Sons

8

A.D. 1858. JANY. 22. Nº 122.
WEILD'S SPECIFICATION.

224 [illegible]

(22 SHEETS)
SHEET 3.

FIG. 9.

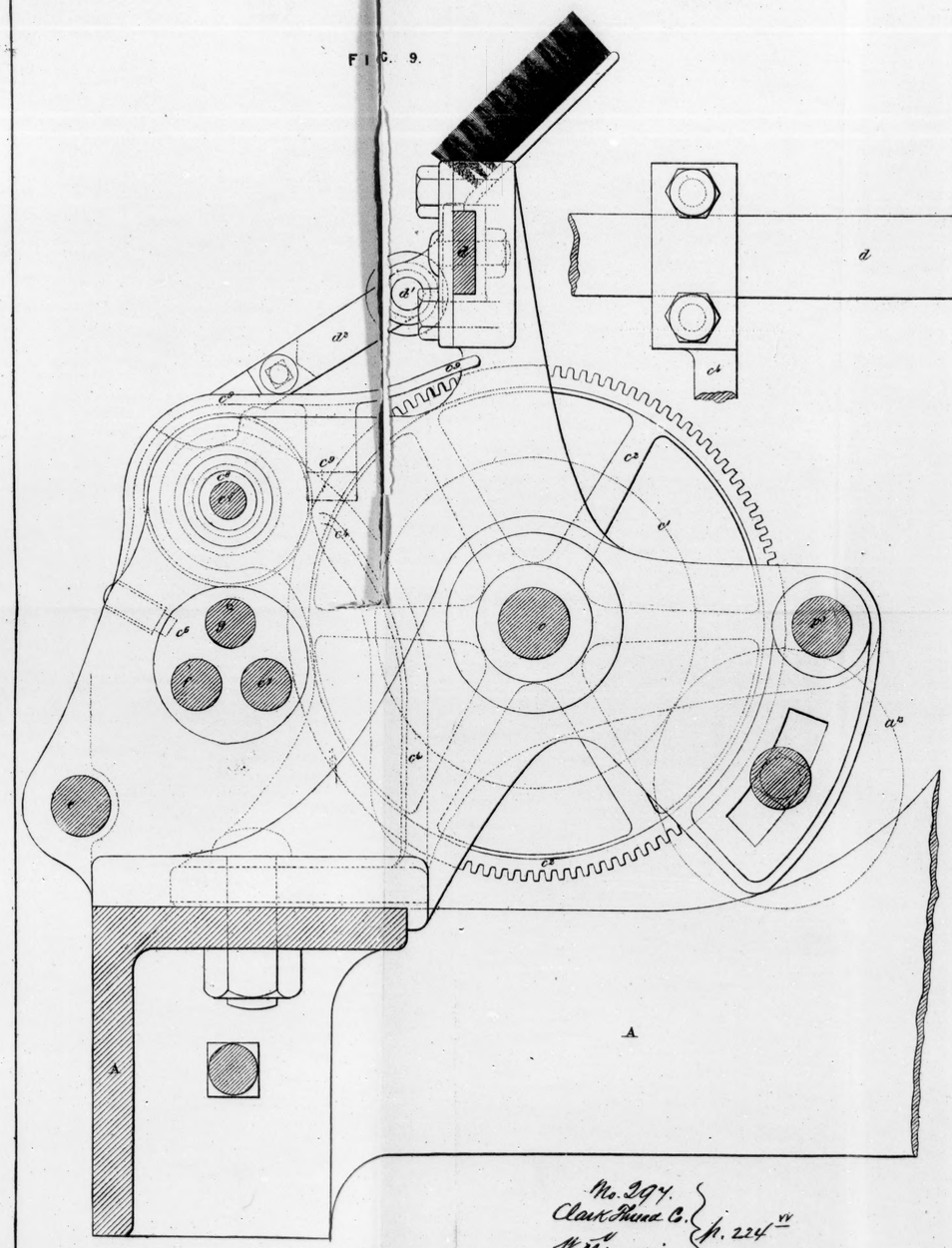
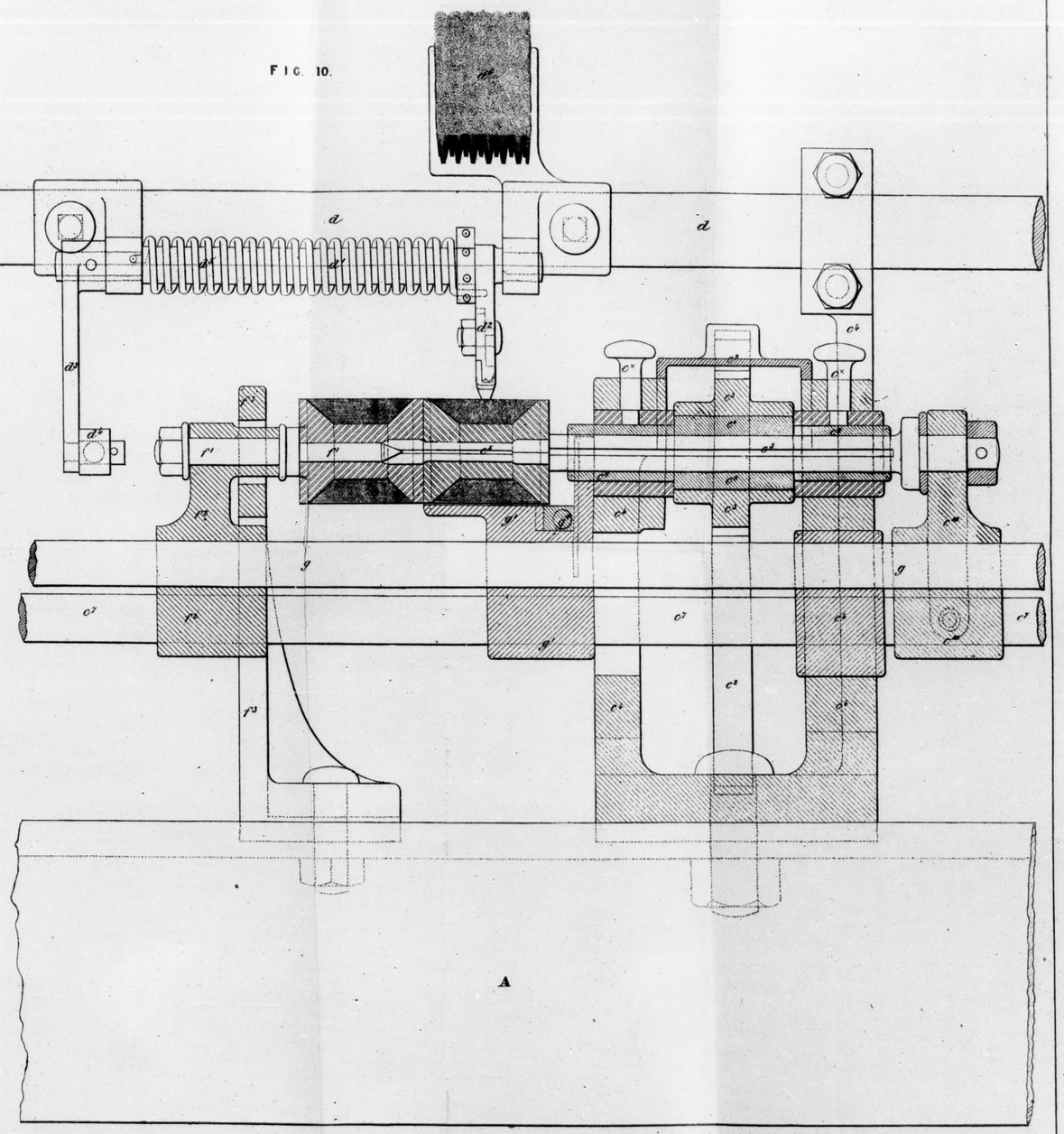


FIG. 10.



No. 294.
Clark Thread Co.
Willimantic
Windham County
Ct.
p. 224 XV

The filed drawing is not colored.

Drawn on Stone by Melby & Sons

A.D. 1858. JANY. 22. Nº 122.
WEILD'S SPECIFICATION.

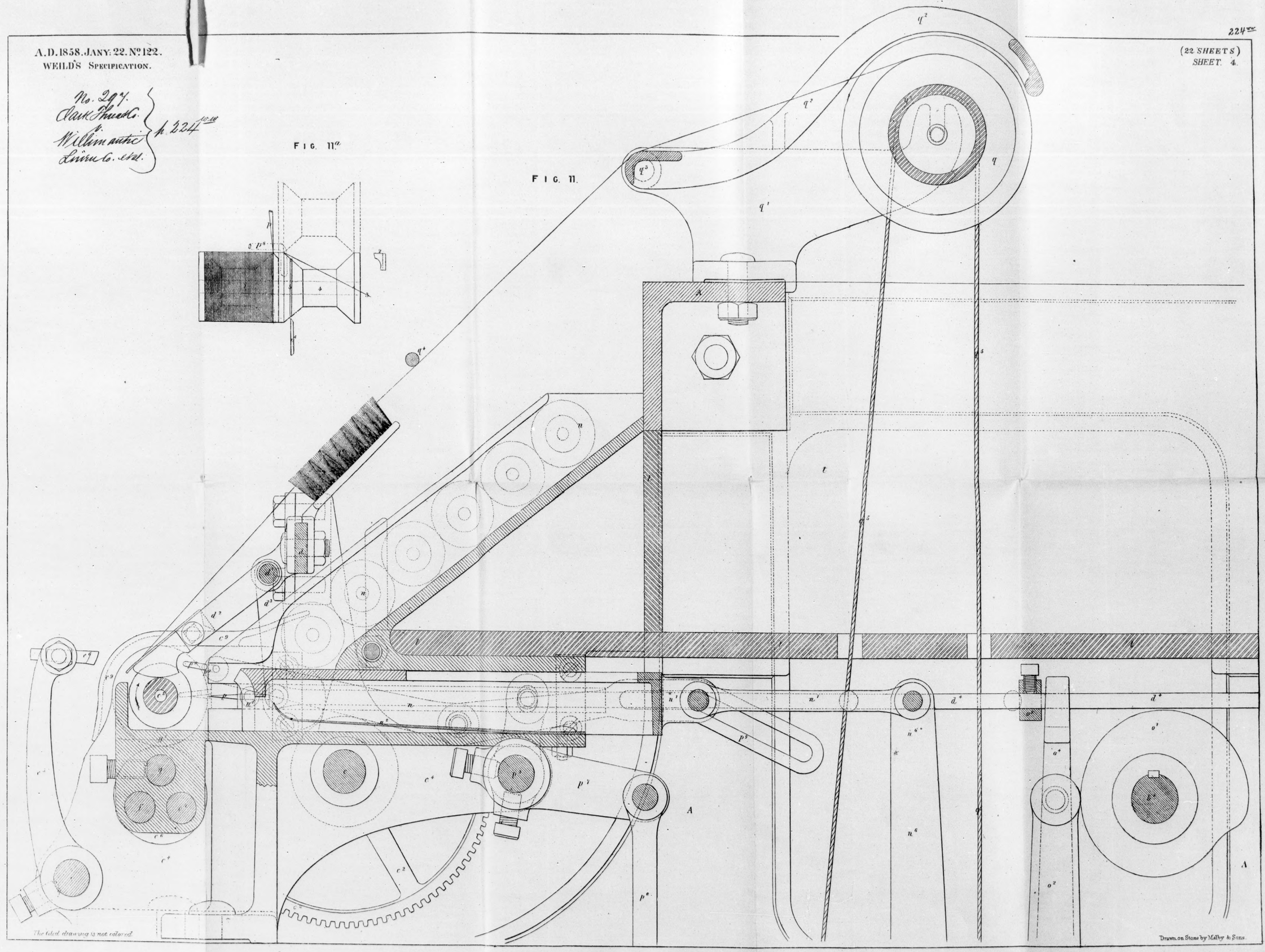
No. 297.
Clark Thread Co.
Willimantic
Linen Co. et al.
v. 224 10-11

224 bis

(22 SHEETS)
SHEET. 4.

FIG. 11a

FIG. 11.



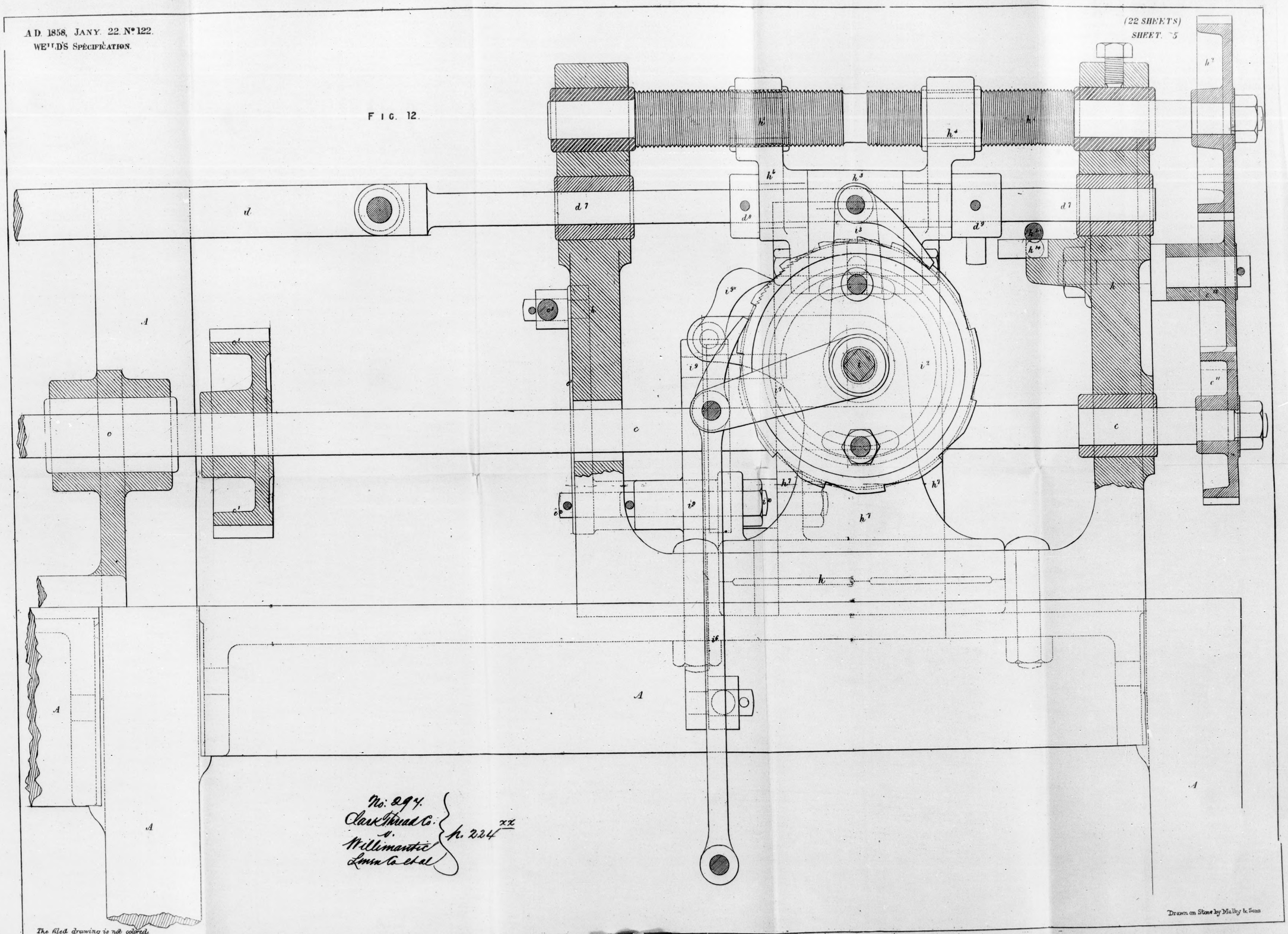
The third drawing is not colored.

Drawn on Stone by Malby & Sons.

A.D. 1858, JANY. 22. N° 122.
WE'LD'S SPECIFICATION.

(22 SHEETS)
SHEET. 5

FIG. 12.



No. 294.
Clark Thread Co.
v.
Willimantic
Linen Co. et al
p. 224 xx

The filed drawing is not colored.

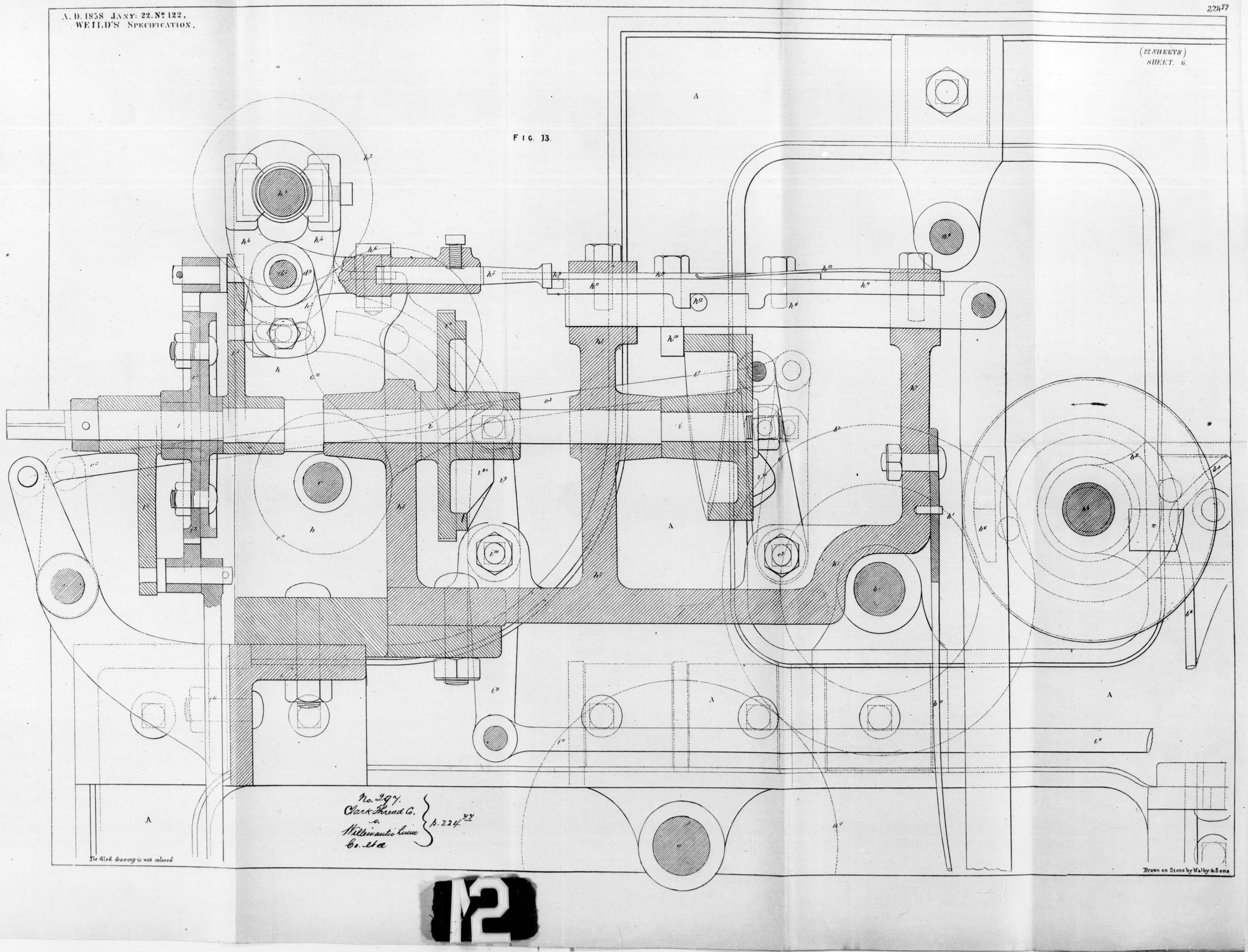
Drawn on Stone by Malby & Sons

A. D. 1858 JANY: 22. Nº 122,
WEILD'S SPECIFICATION.

22477

(22 SHEETS)
SHEET. 6.

FIG. 13.



No. 297.
Clark Thread Co.
v.
Willimantic Linen
Co. et al
} p. 224 yy

The filed drawing is not colored

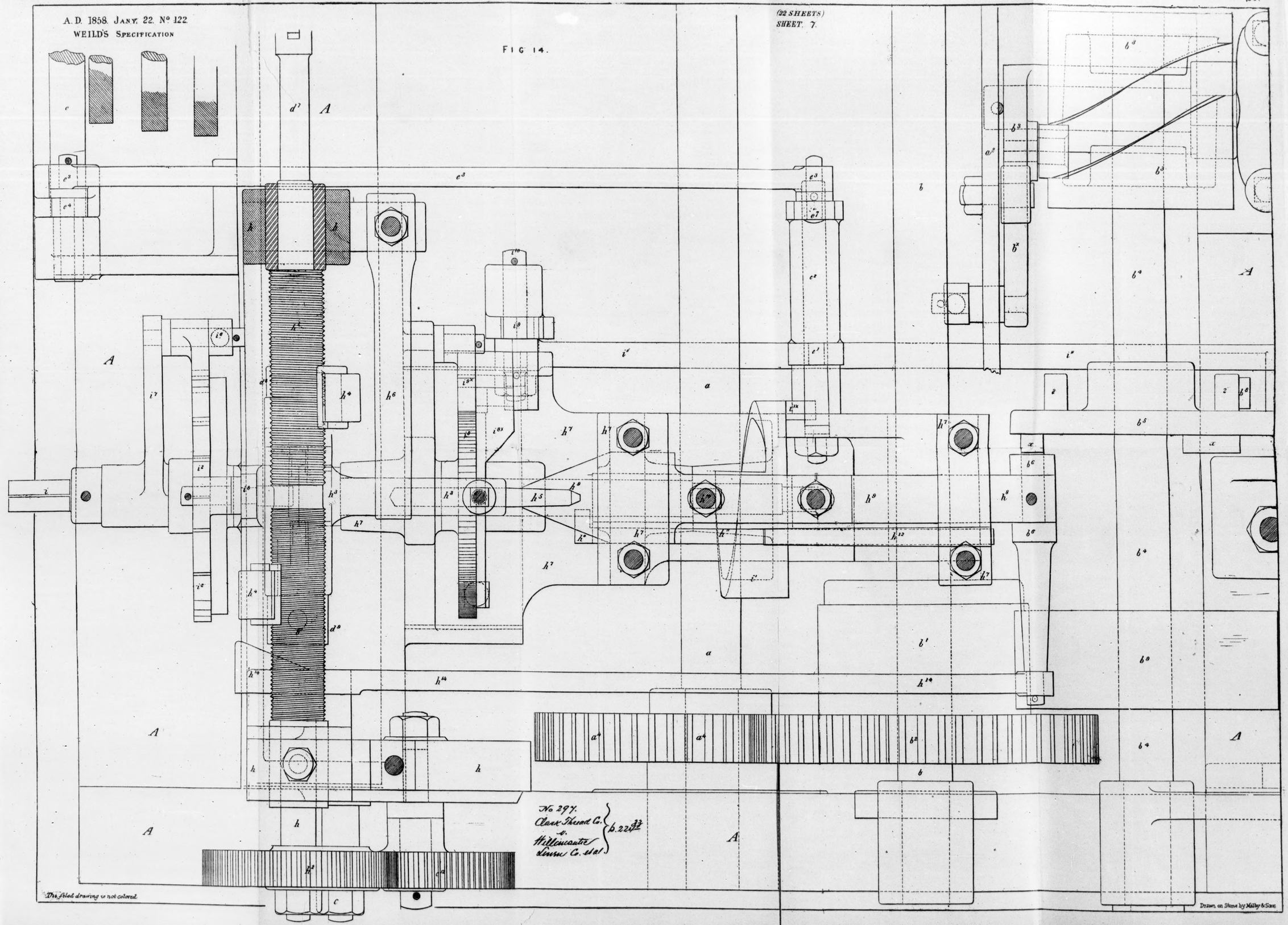
Drawn on Stone by Malby & Sons

12

A.D. 1858. JANY. 22. Nº 122.
WEILD'S SPECIFICATION

(22 SHEETS)
SHEET. 7.

FIG 14.



No 297.
Clark Thread Co.
v.
Williamantic
Linen Co. et al.
b. 22 Feb 23

The folded drawing is not colored.

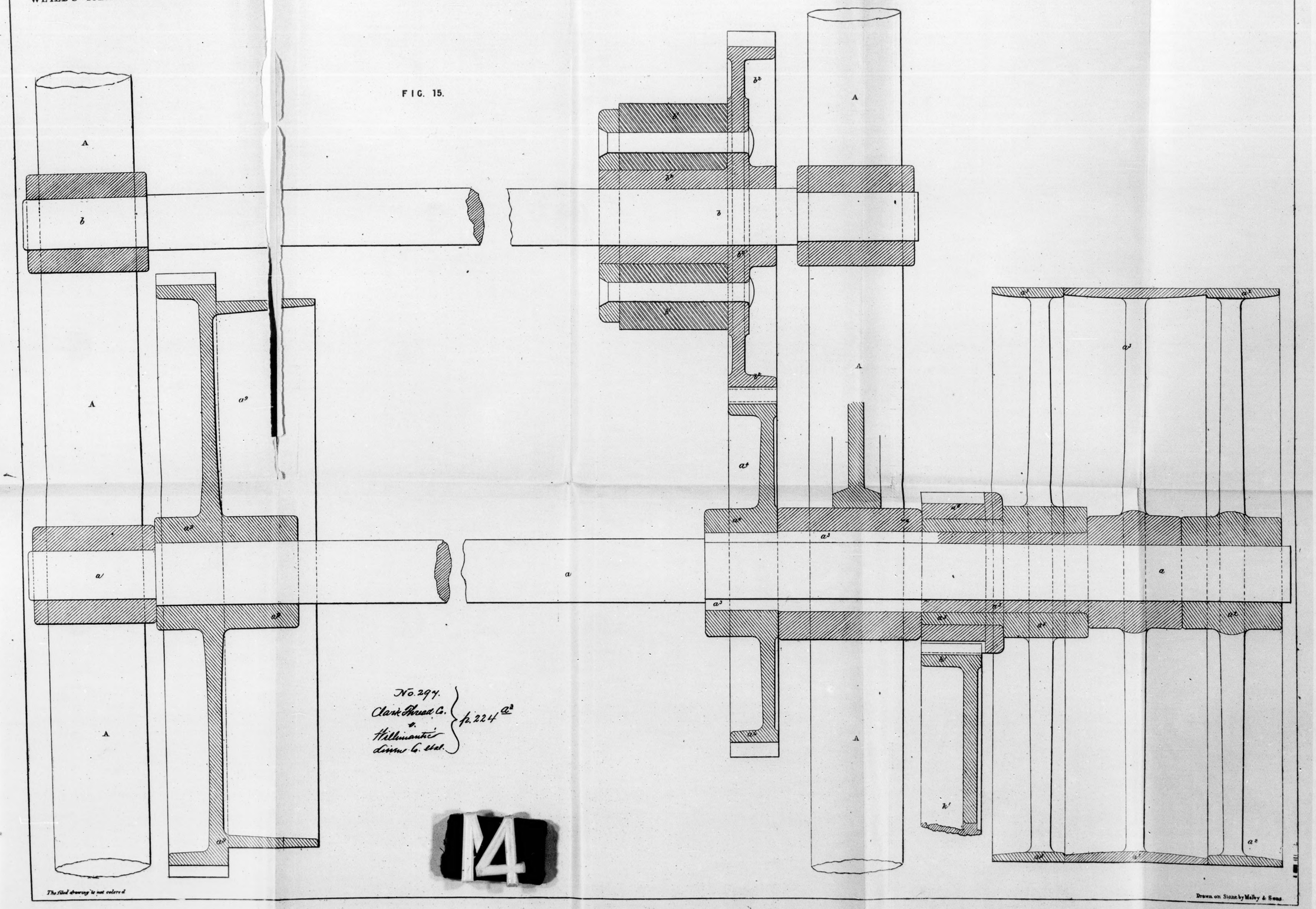
Drawn on Stone by Malby & Sons

73

A.D. 1858. JANY: 22. Nº 122.
WEILD'S SPECIFICATION.

(22 SHEETS)
SHEET. 8.

FIG. 15.



No. 294.
Clark Thread C.
v.
Hollingsworth
Lewis C. Ct. } p. 224 a²

14

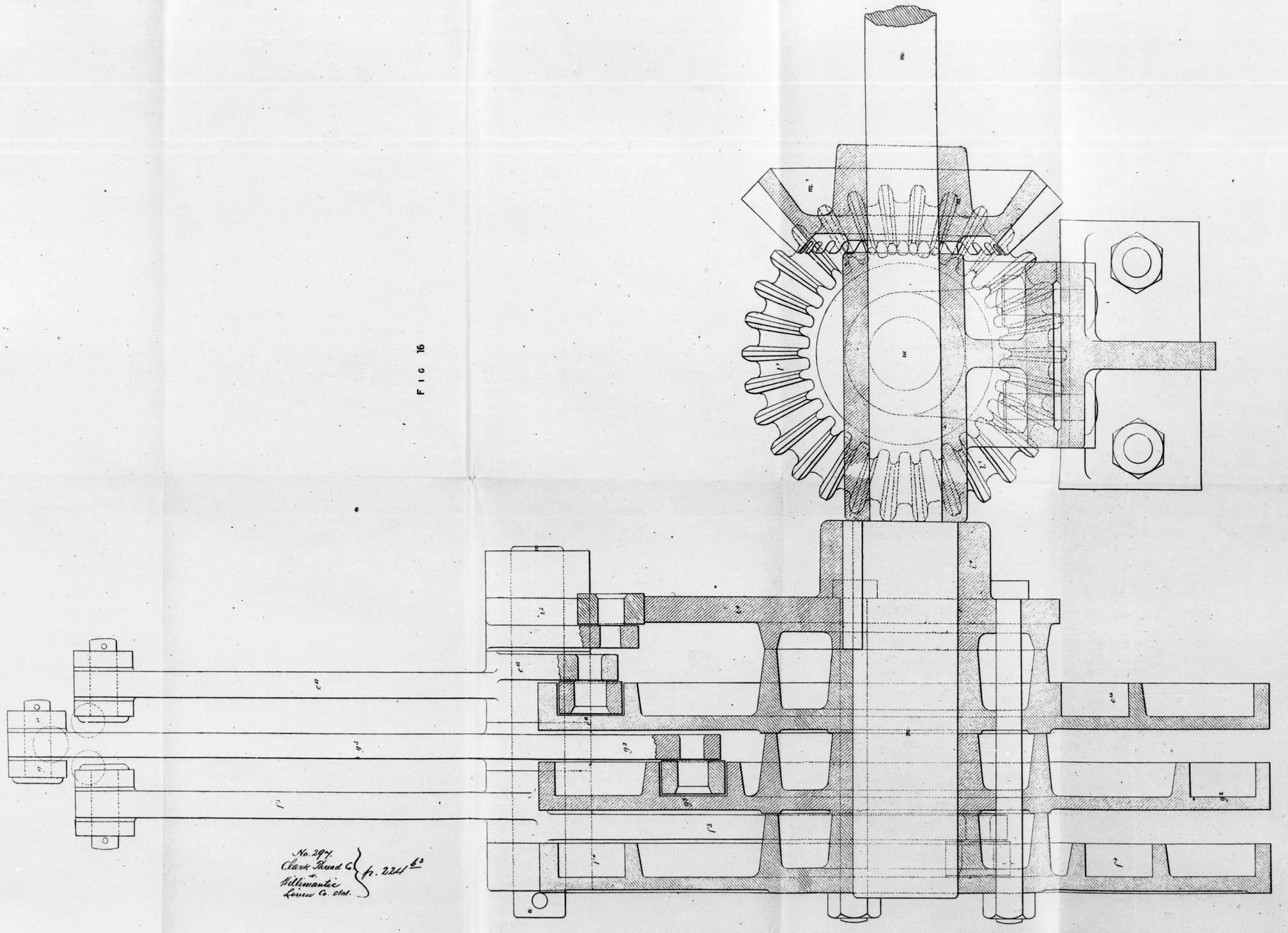
The filed drawing is not colored.

Drawn on Stone by Maley & Sons.

A.D. 1858. JANY. 22. Nº 122.
WEILD'S SPECIFICATION.

(22 SHEETS)
SHEET 9

FIG 16



No. 297.
Clark Thread Co.
v.
Hillimantic
Lenen Co. et al.
fp. 224 6/3

The filed drawing is not colored.

Drawn on Stone by Malby & Sons.

15

22462

Drawn on Stone by Maltby & Sons

The filled drawing is not colored

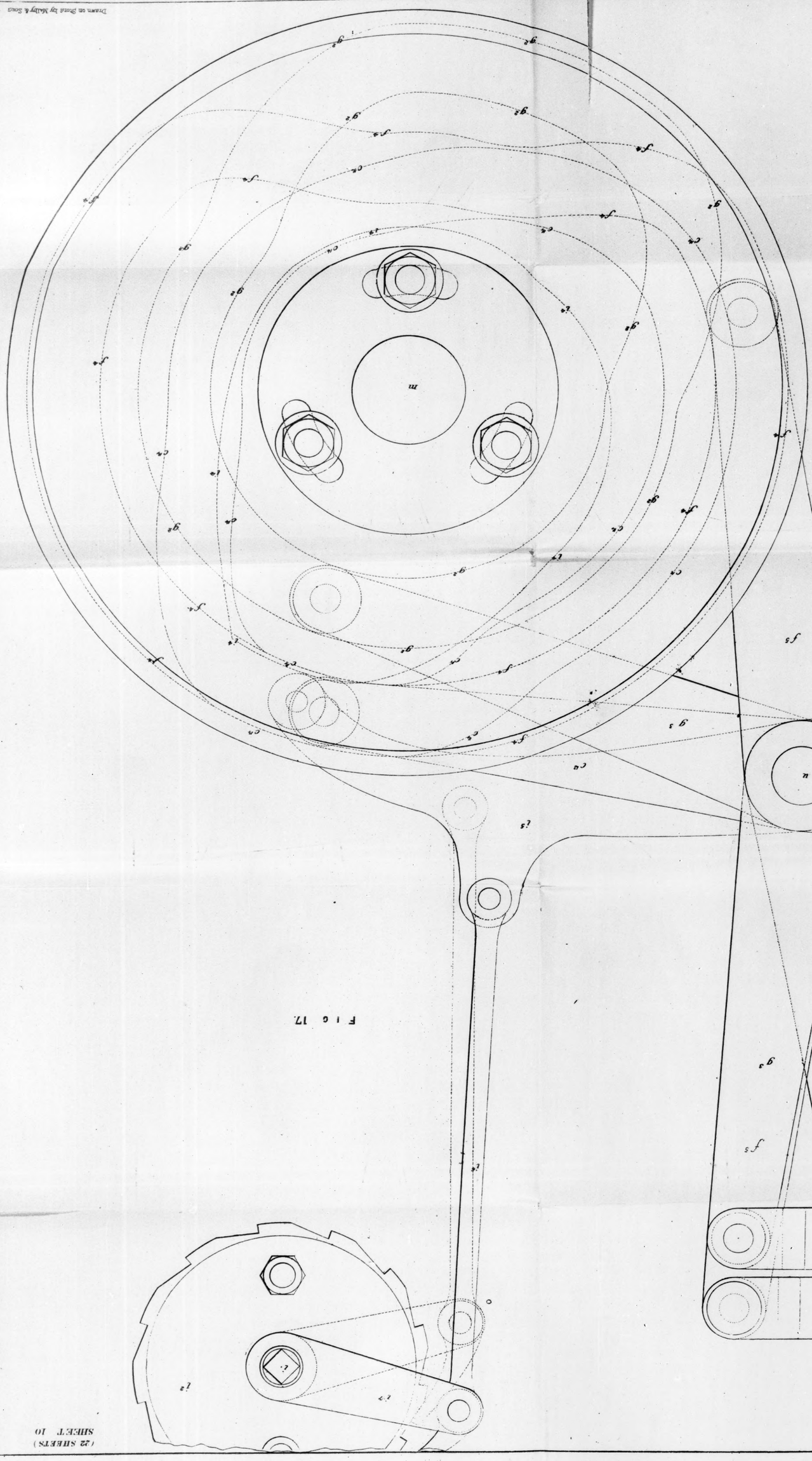


FIG 17.

A D 1858 JANY 22 No 122
WEILD'S SPECTIFICATION.

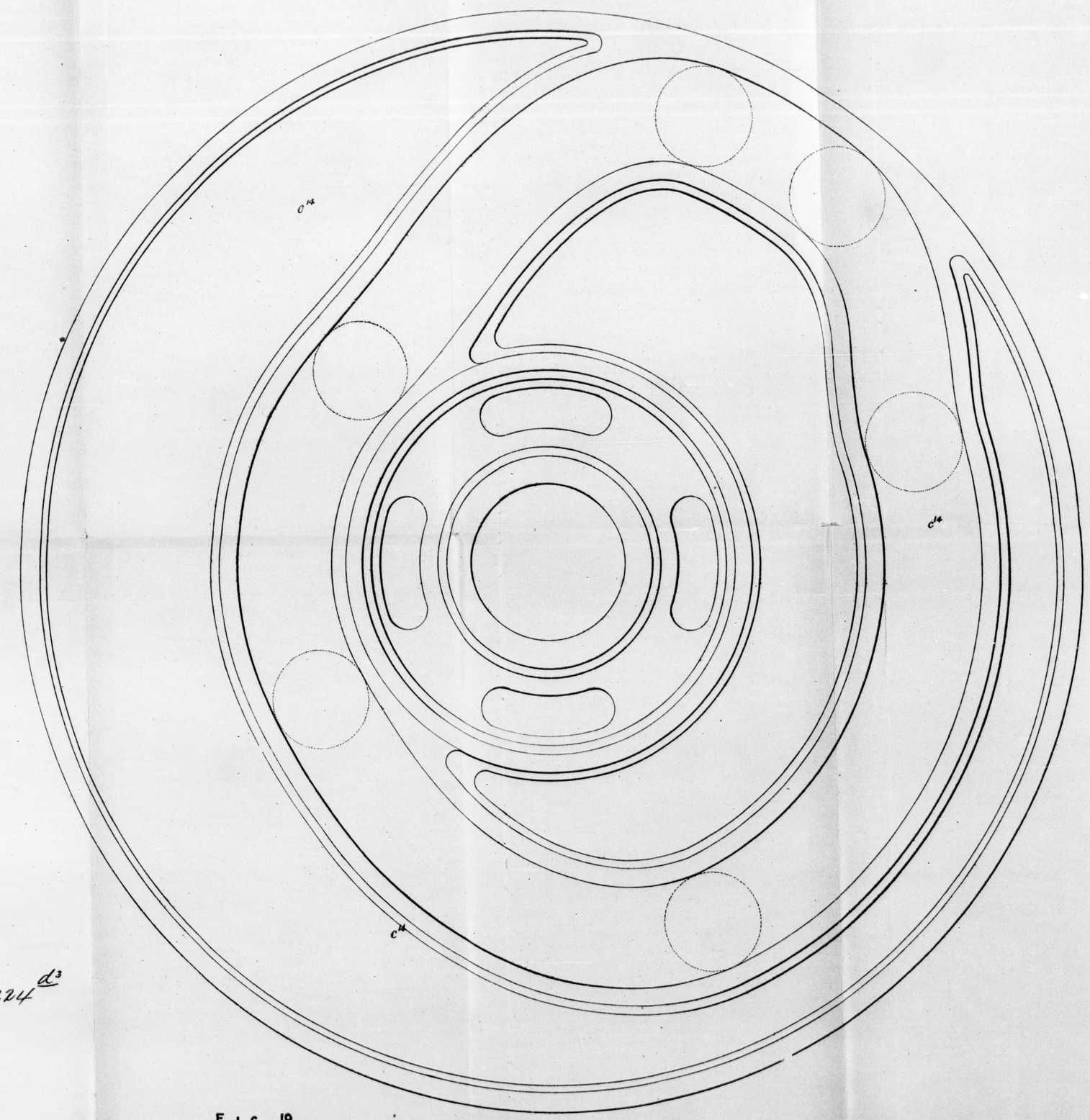
(22 SHEETS)
SHEET 10

224 d 3

A.D. 1858. JANY. 22. Nº122.
WEILD'S SPECIFICATION.

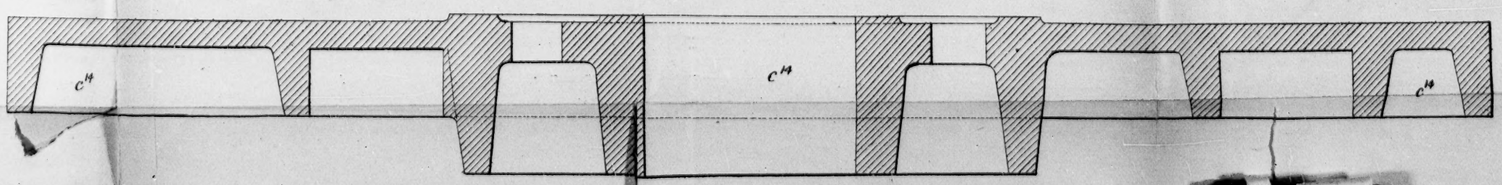
(22 SHEETS)
SHEET. 11.

FIG 18



No. 297.
Clark Thread Co
v.
Millimautic Limited
Company et al.
p. 224 d3

FIG. 19



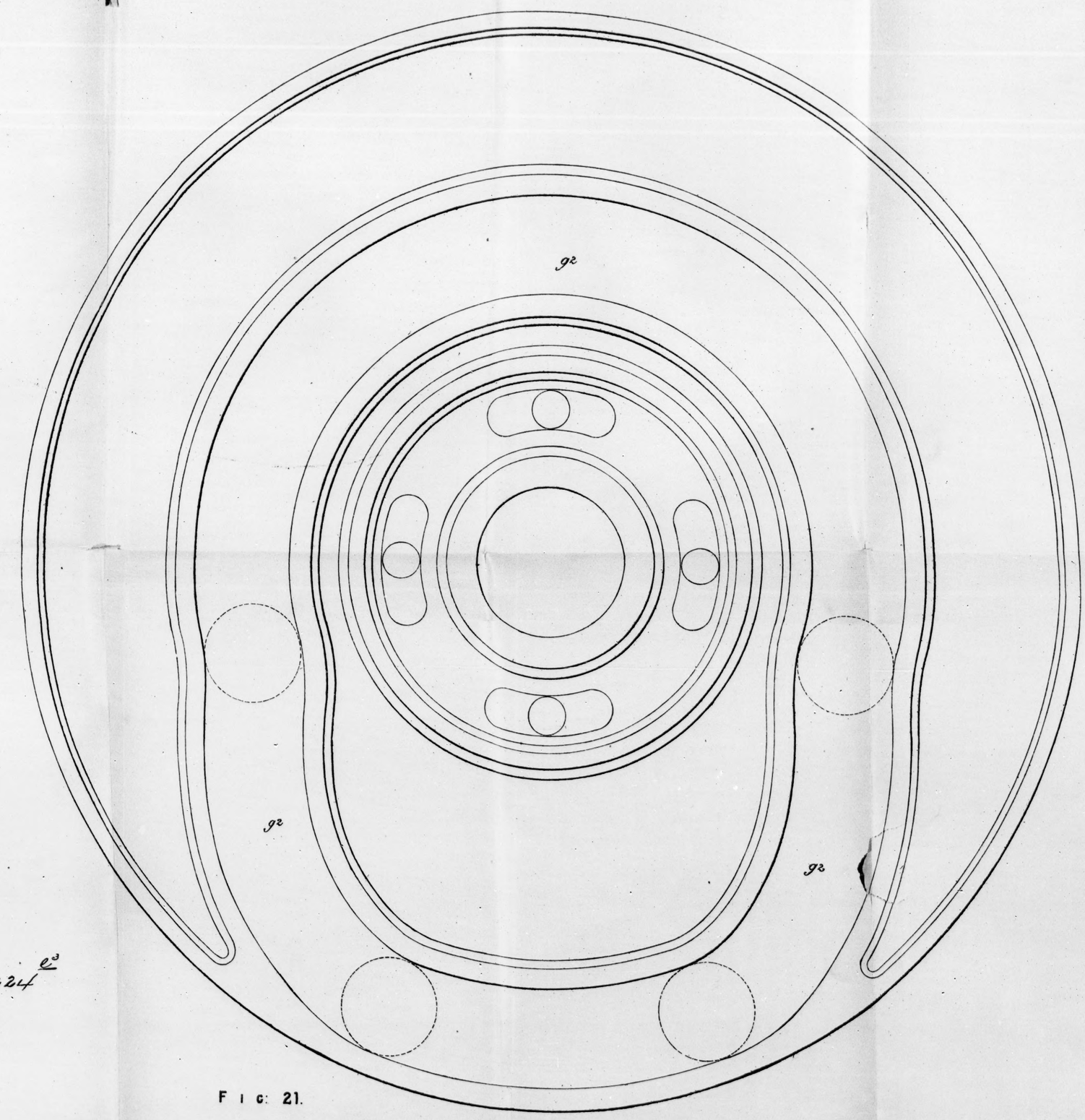
The filed drawing is not colored.

Drawn on Stone by Malby & Sons.

A.D. 1858, JANY. 22. Nº122.
WEILD'S SPECIFICATION.

(22 SHEETS)
SHEET. 12.

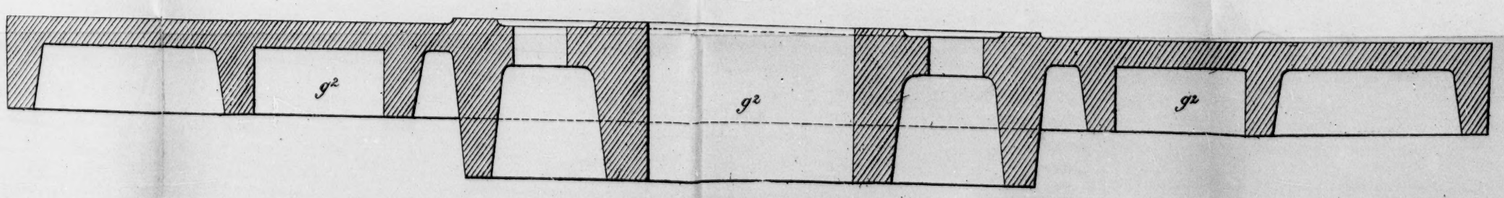
FIG: 20.



No. 297.
Clark Thread C.
v.
Willimantic
Linen Coetal

ft. 224 e3

FIG: 21.



The filed drawing is not colored.

Drawn on Stone by Malby & Sons

A.D. 1858 JANY 22. Nº 122.
WEILD'S SPECIFICATION.

22 SHEETS
SHEET 13

FIG: 25

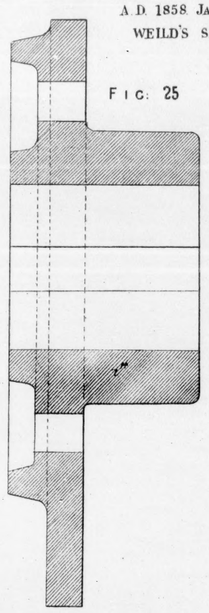


FIG: 24

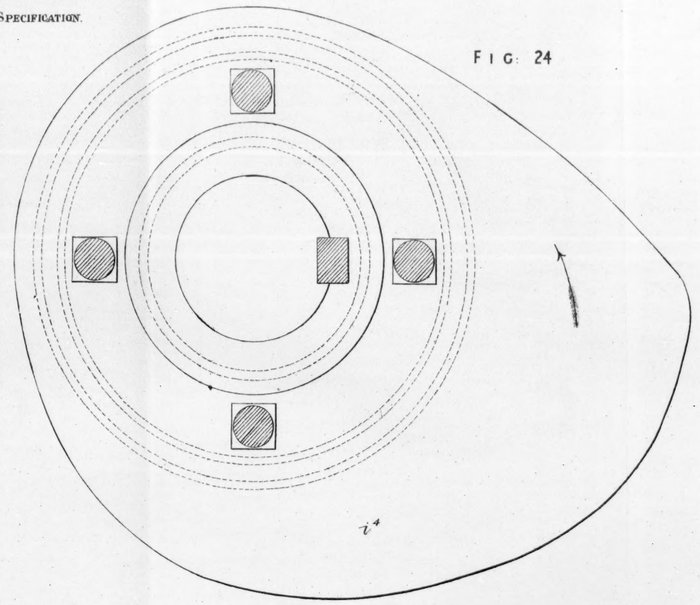


FIG: 22

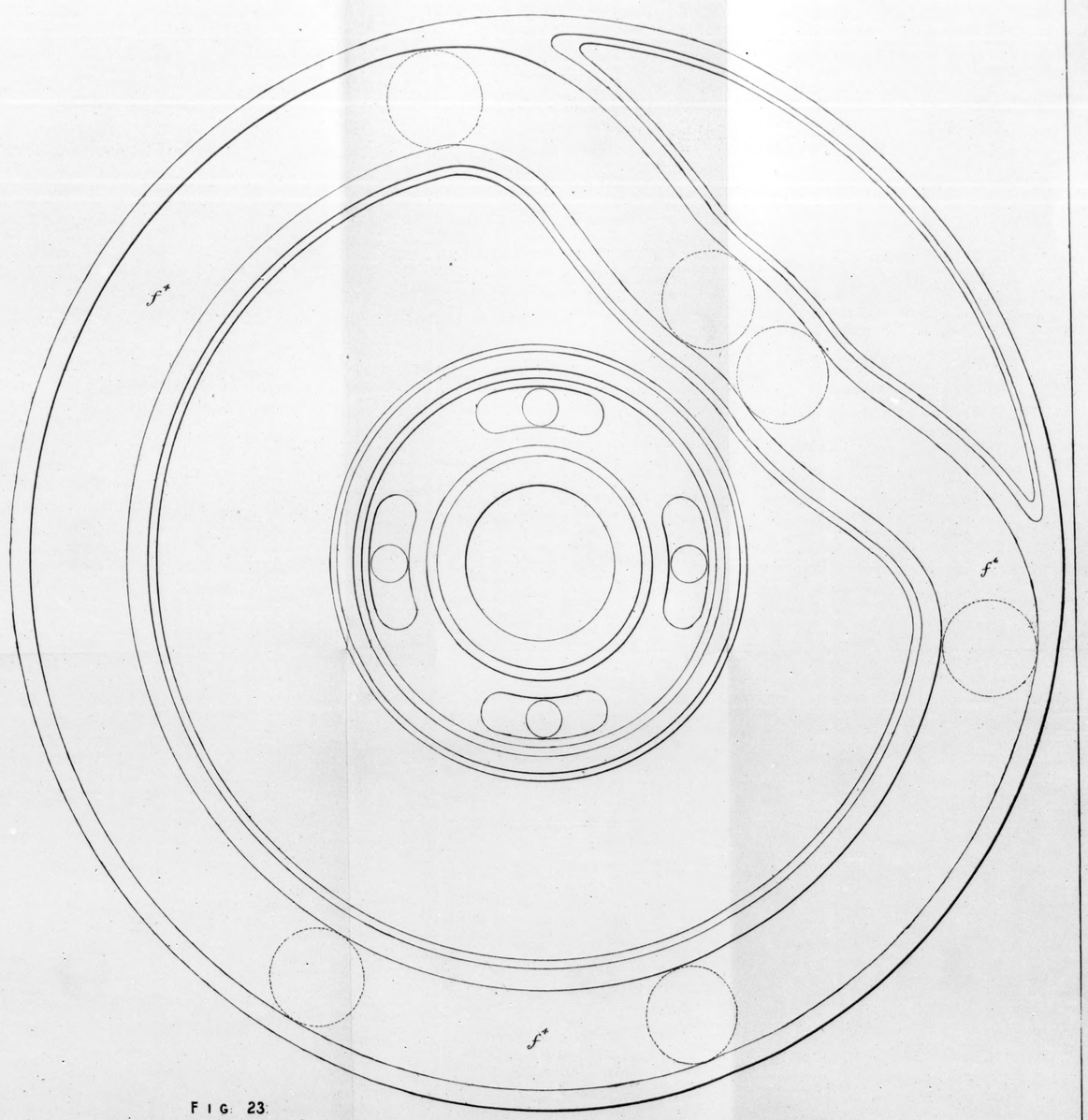
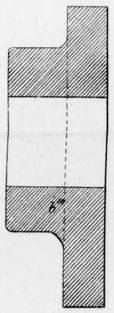


FIG: 27



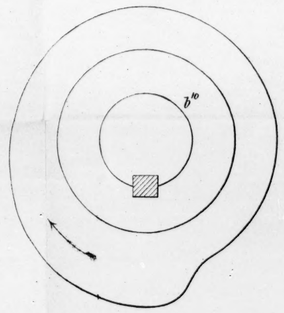
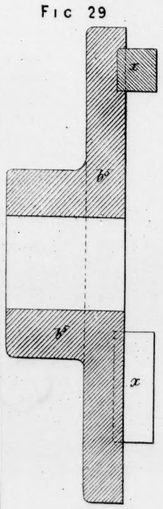


FIG: 26

FIG 29



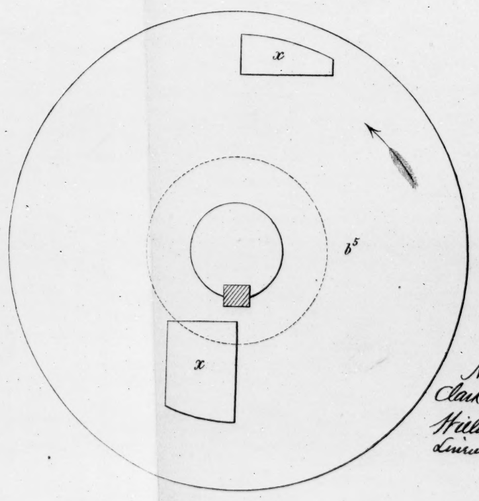
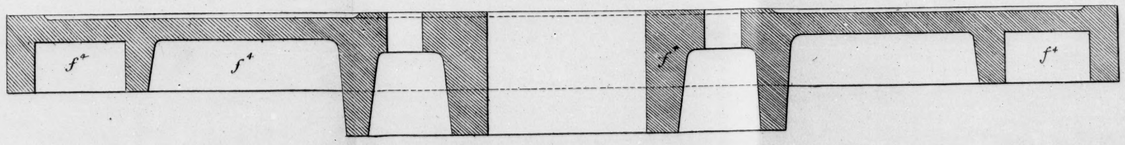


FIG: 28

FIG: 23



No. 294.
Clark Thread Co.
v.
Willimantic
Linen Co. et al
} p. 2224

The filed drawing is not colored.

Drawn on Stone by Malby & Sons

19

A.D. 1858. JANY. 22. Nº 122.
WEILD'S SPECIFICATION.

FIG. 30.

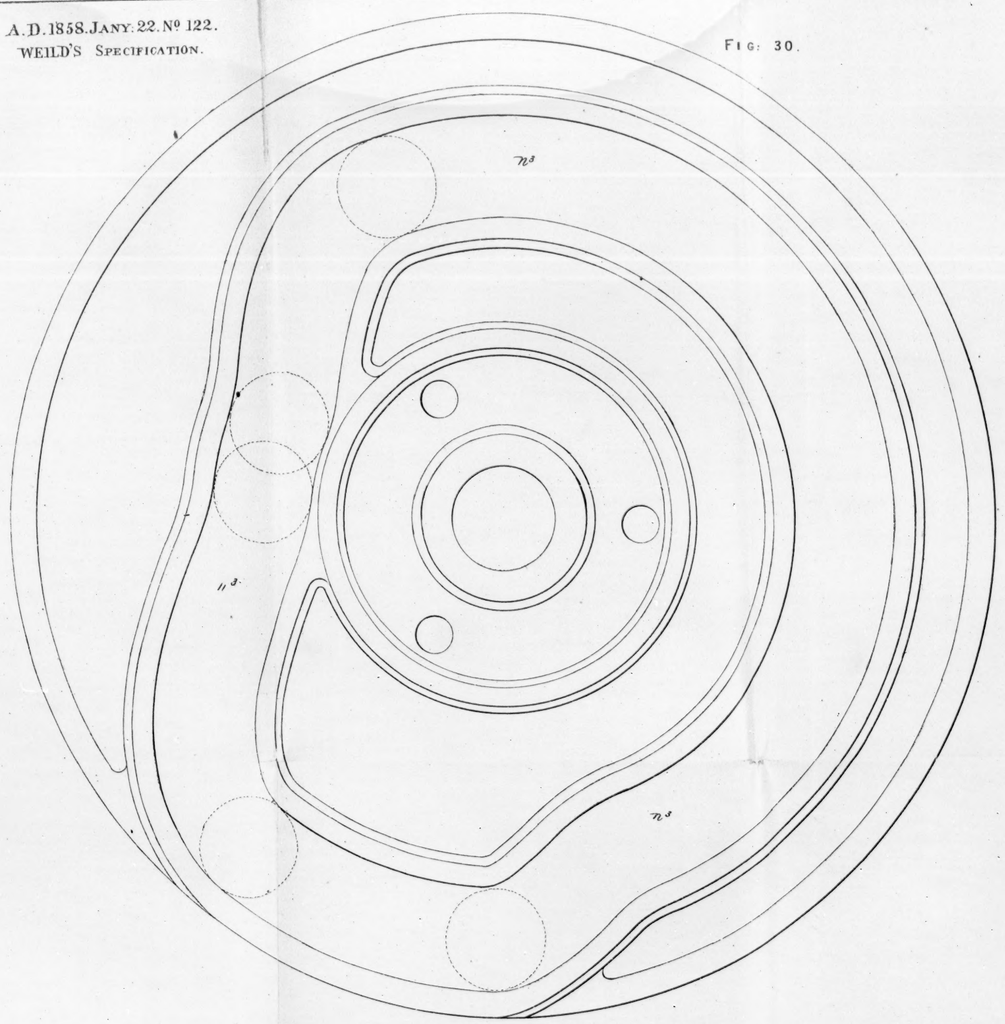


FIG. 31.

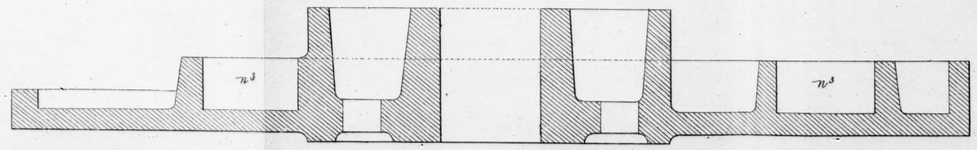


FIG. 32.

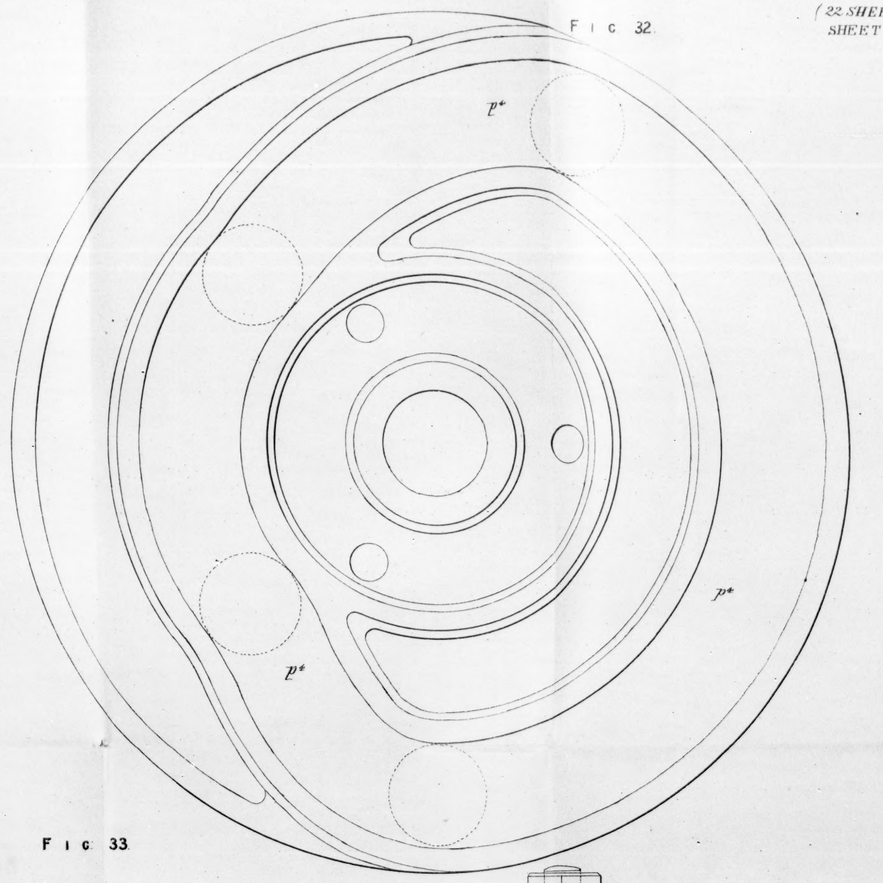
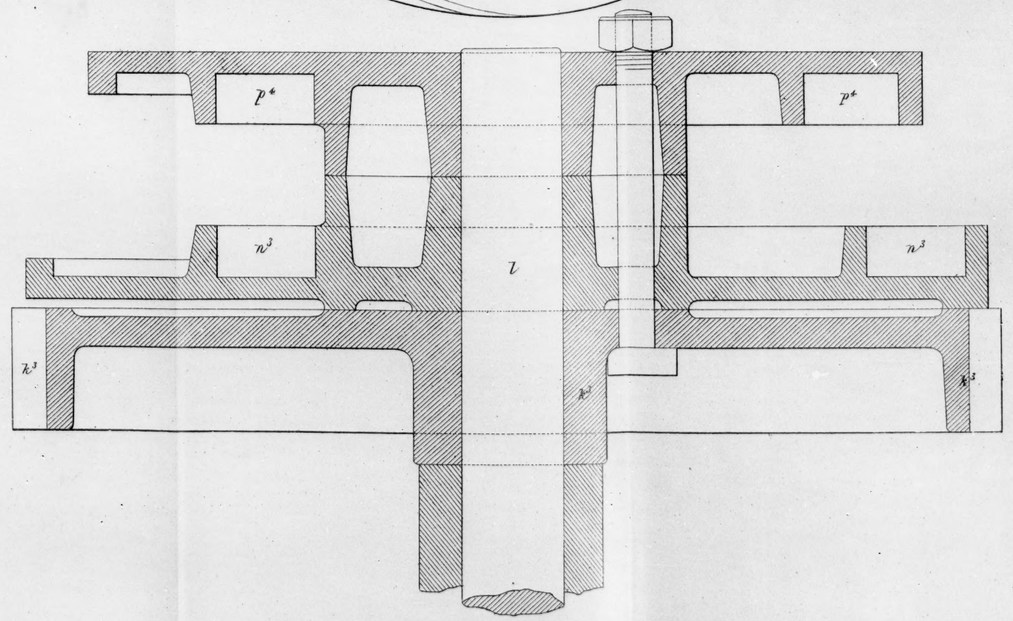


FIG. 33.



No. 297.
Clark Thread Co.
v.
Willimantic Linen Co et al.
} p. 2214 B3

The filed drawing is not colored.

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20

A.D. 1858. JANY. 22. Nº122.
WEILD'S SPECIFICATION.

No 297.
Clark Thread Co.
vs.
Willimantic Linen Co. et al. } p. 224

2244

(22 SHEETS)
SHEET. 15.

FIG. 38.

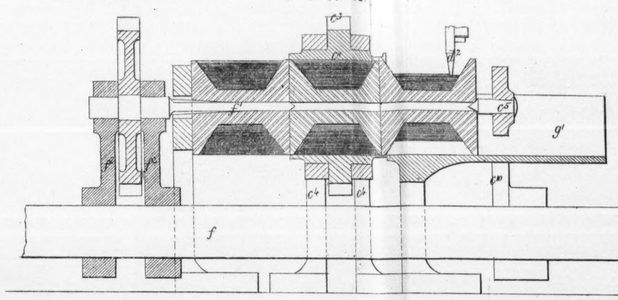


FIG. 37.

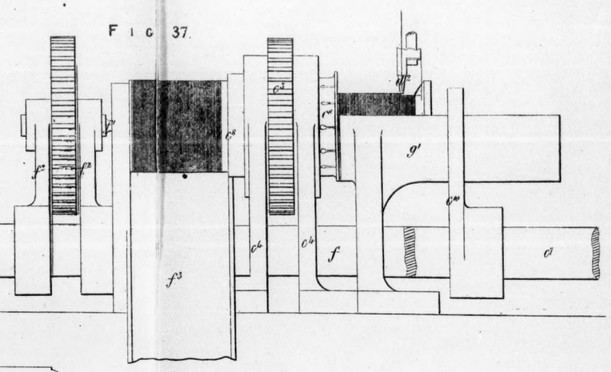


FIG. 34.

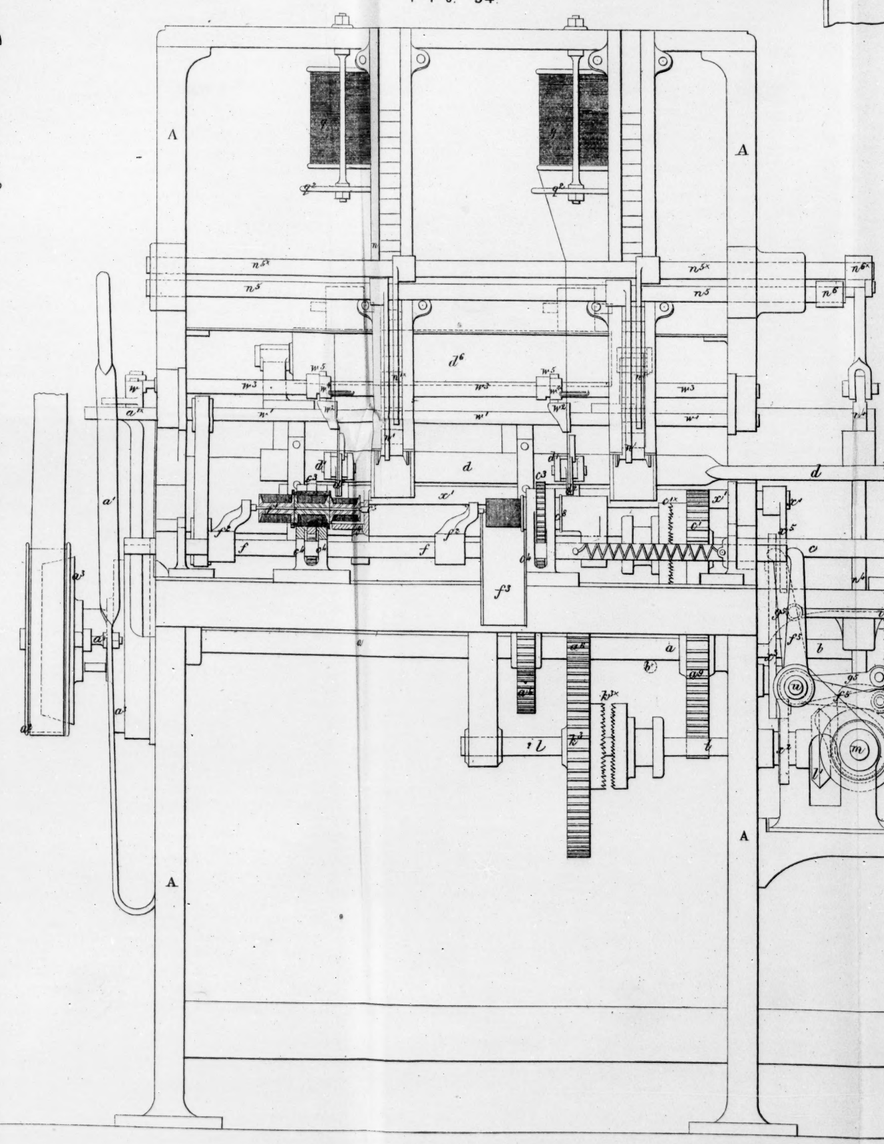


FIG. 36.

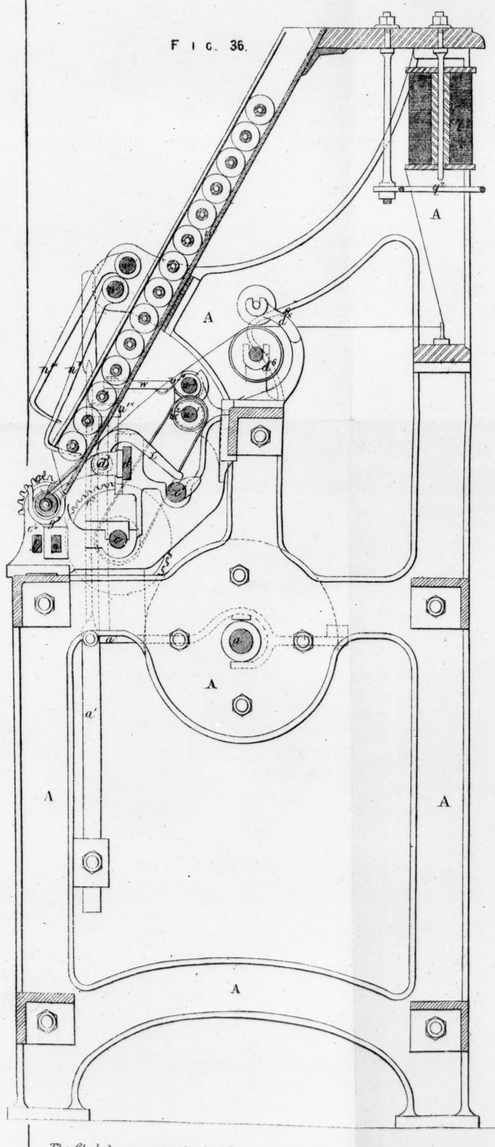
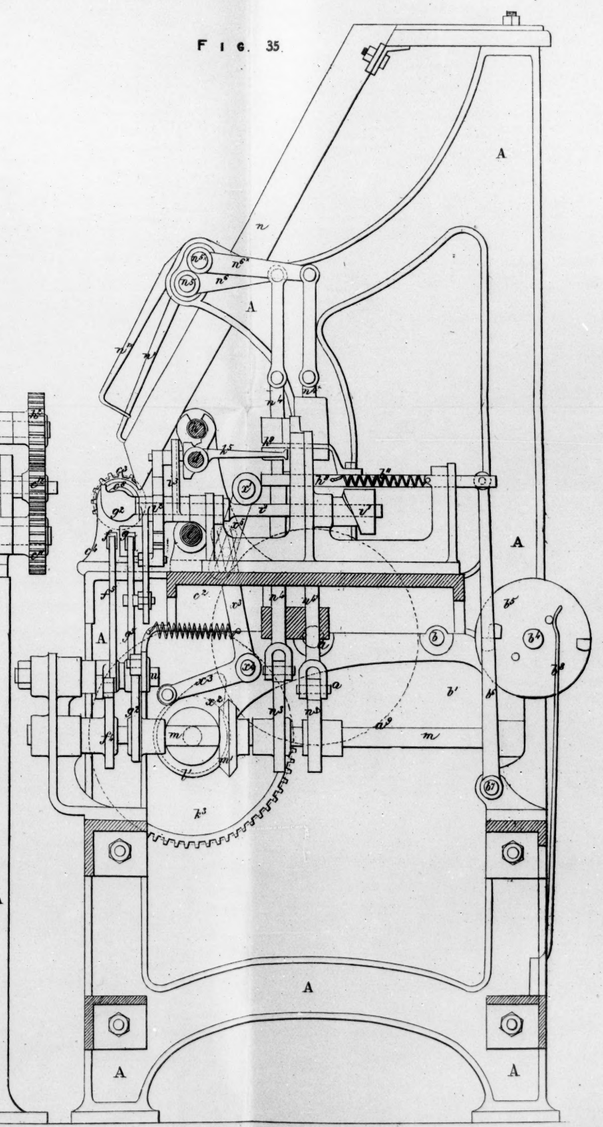


FIG. 35.



The filed drawing is not colored.

Drawn on Stone by Malby & Sons

21

A.D. 1858. JANY. 22. Nº 122.
WEILD'S SPECIFICATION.

No. 297.
Clark Thread Co.
v.
Willimantic
Linen Coetal.
} p. 224 i3

224 i3

(22 SHEETS.)
SHEET. 16.

FIG. 39.

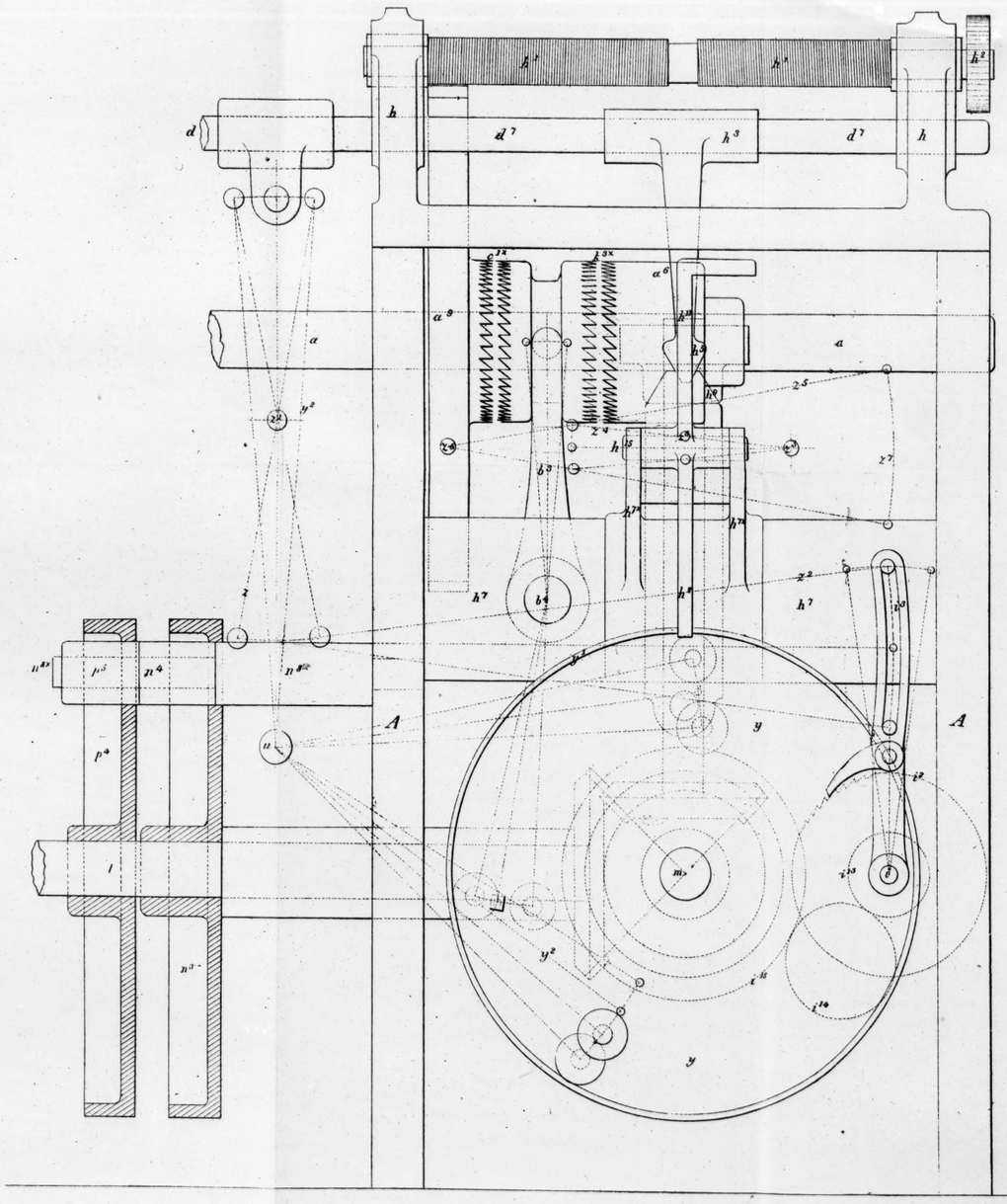


FIG. 40

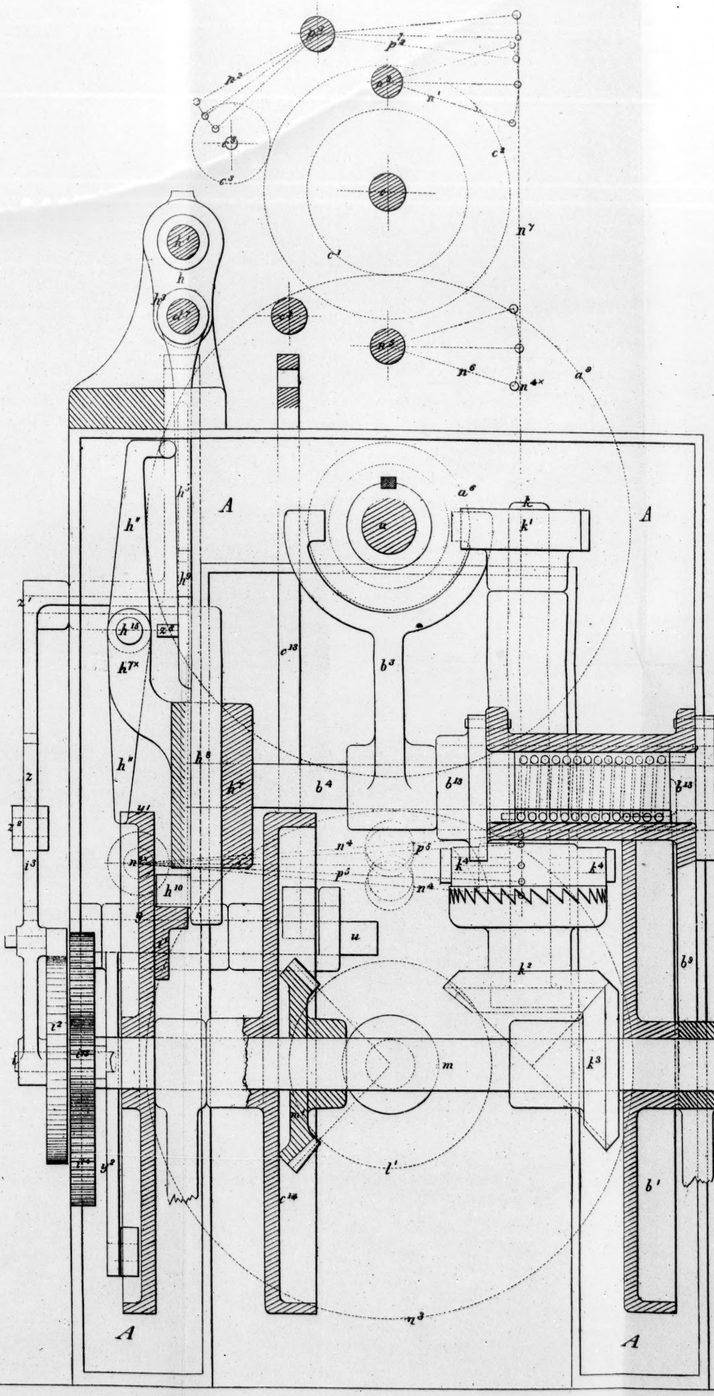
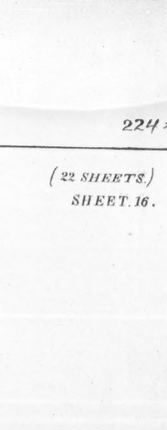


FIG. 40ª



The filed drawing is not colored

Drawn on Stone by Malby & Sons

22

A.D. 1858. JANY. 22. Nº 122.
WEILD'S SPECIFICATION.

No. 297.
Clerk Rhead &
Williamson's
& al
} p. 224

(22 SHEETS)
SHEET 17

FIG. 43.

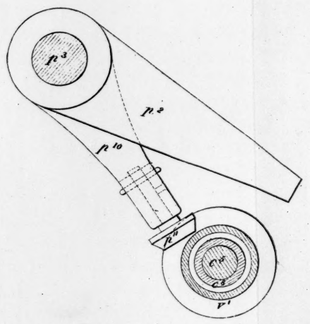


FIG 41.

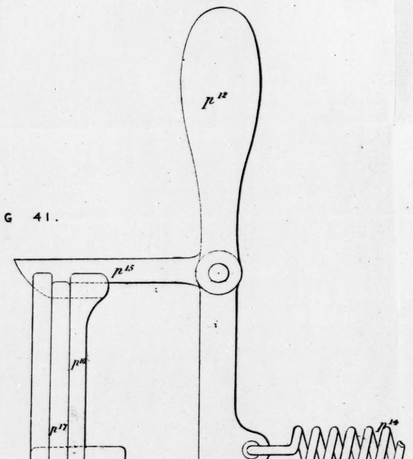
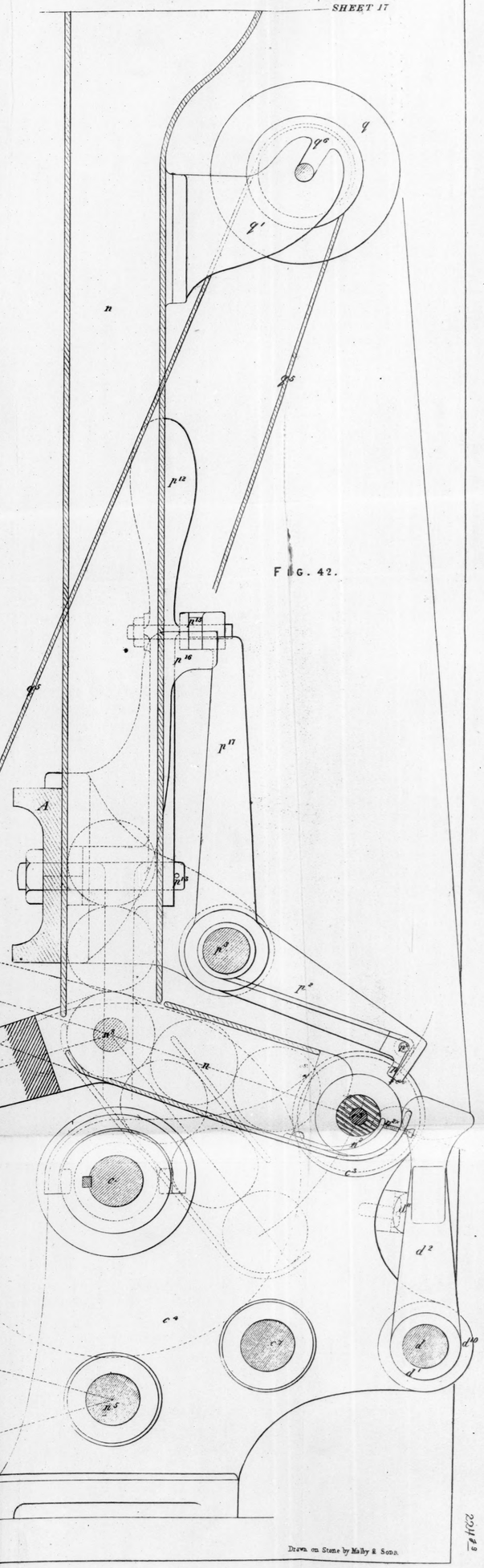


FIG. 42.



The filed drawing is not colored.

Drawn on Stone by Malby & Sons.

2 sheets

A.D. 1858. JANY. 22. Nº 122.

WEILD'S SPECIFICATION.

No. 294
Clark Thread Co.
Williamantic
Lyons Co. et al
} p. 224 K2

(22 SHEETS)
SHEET 18

FIG. 44.

The filed drawing is not colored.

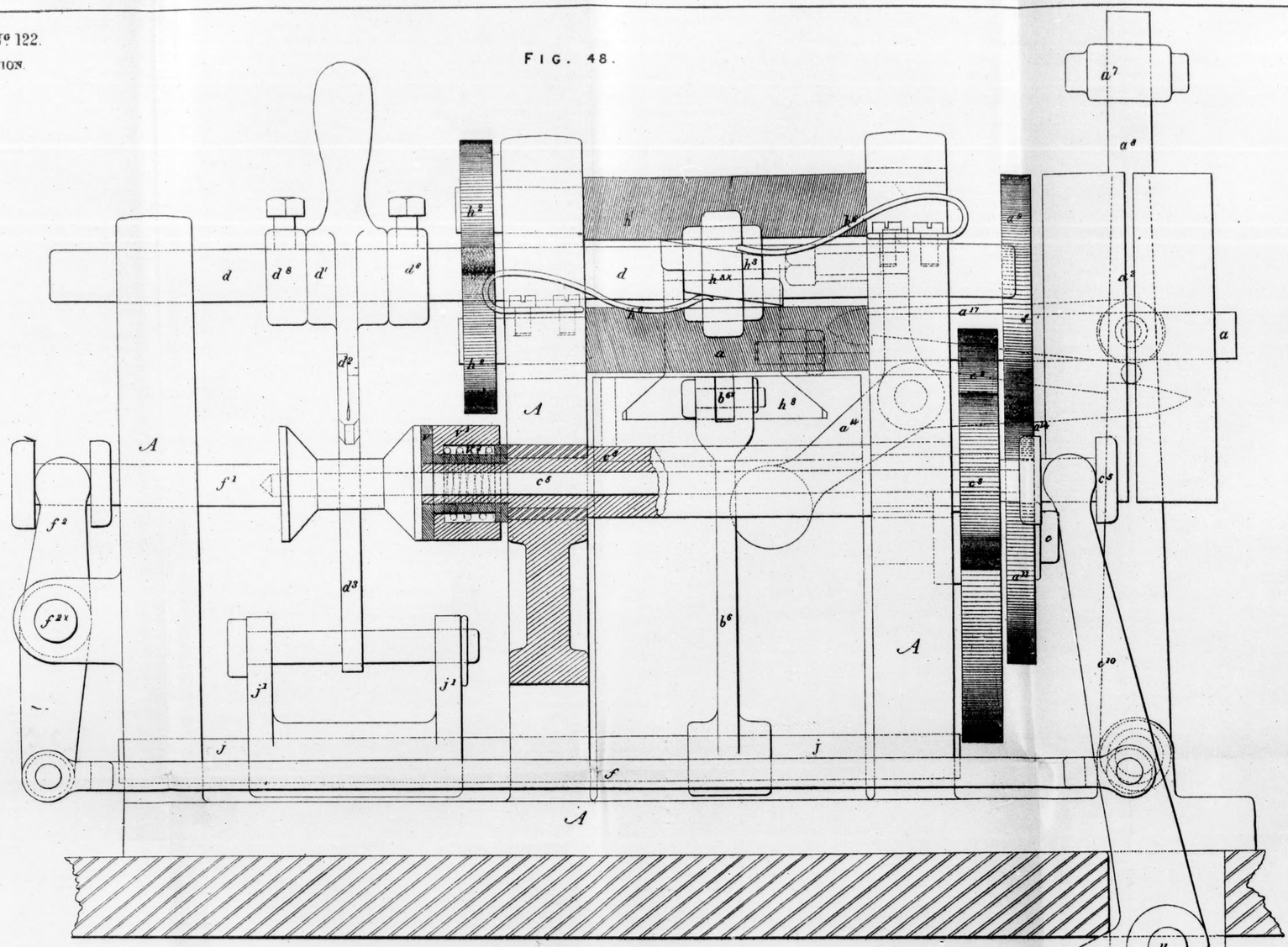
Drawn on Stone by Maby & Sons.

24

A. D. 1858. JANY. 22. Nº 122.
WEILD'S SPECIFICATION.

(22 SHEETS)
SHEET. 20.

FIG. 48.


A
A
A
A
d
d
d

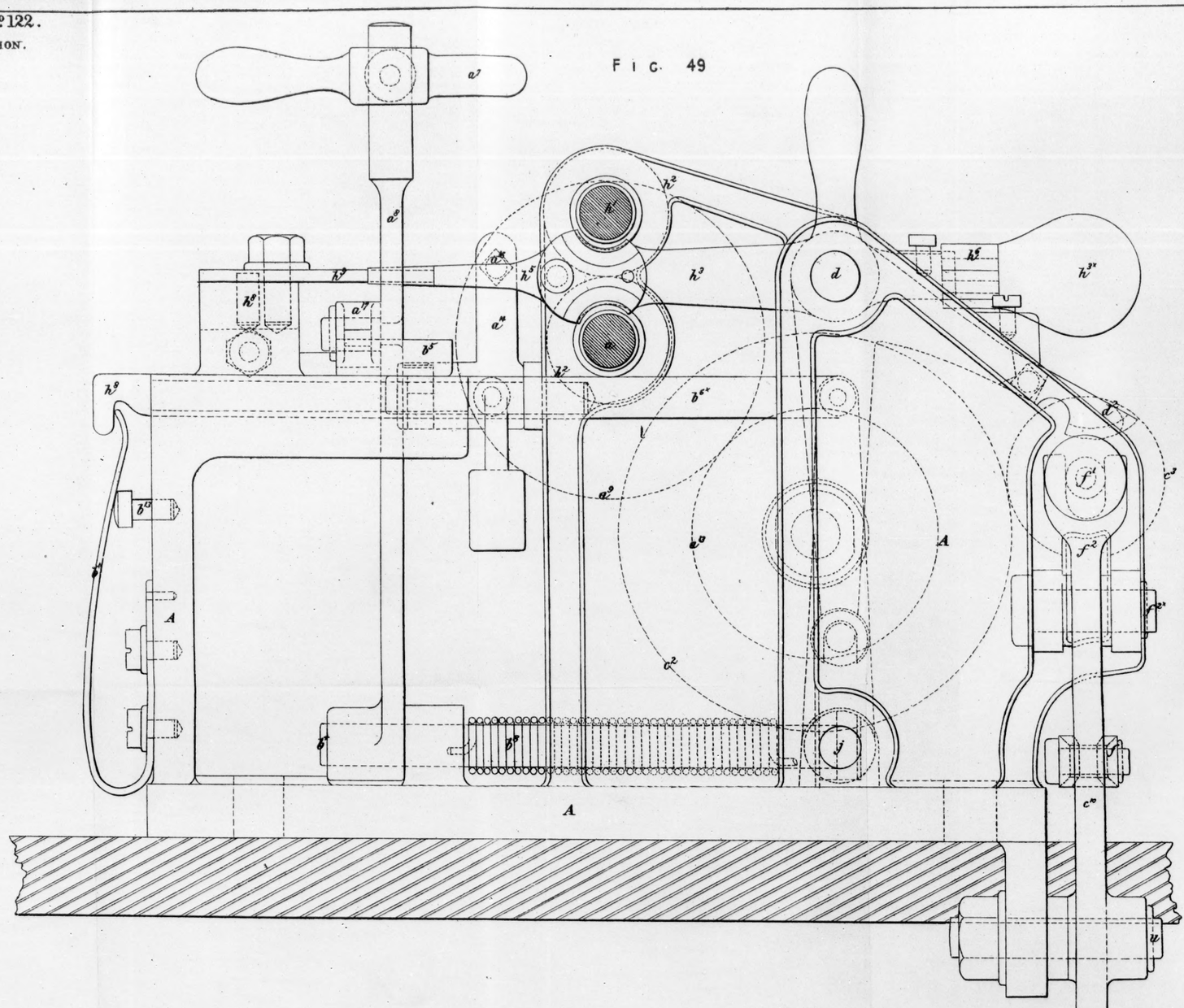
A. D. 1858. JANY: 22. Nº 122.

WEILD'S SPECIFICATION.

2224 n3

32 SHEETS
SHEET 21

FIG. 49



No. 297
The Clark Thread Co.
v.
The Willimantic Linen
Company et al.

} fr. 2224 n3

The filed drawing is not colored.

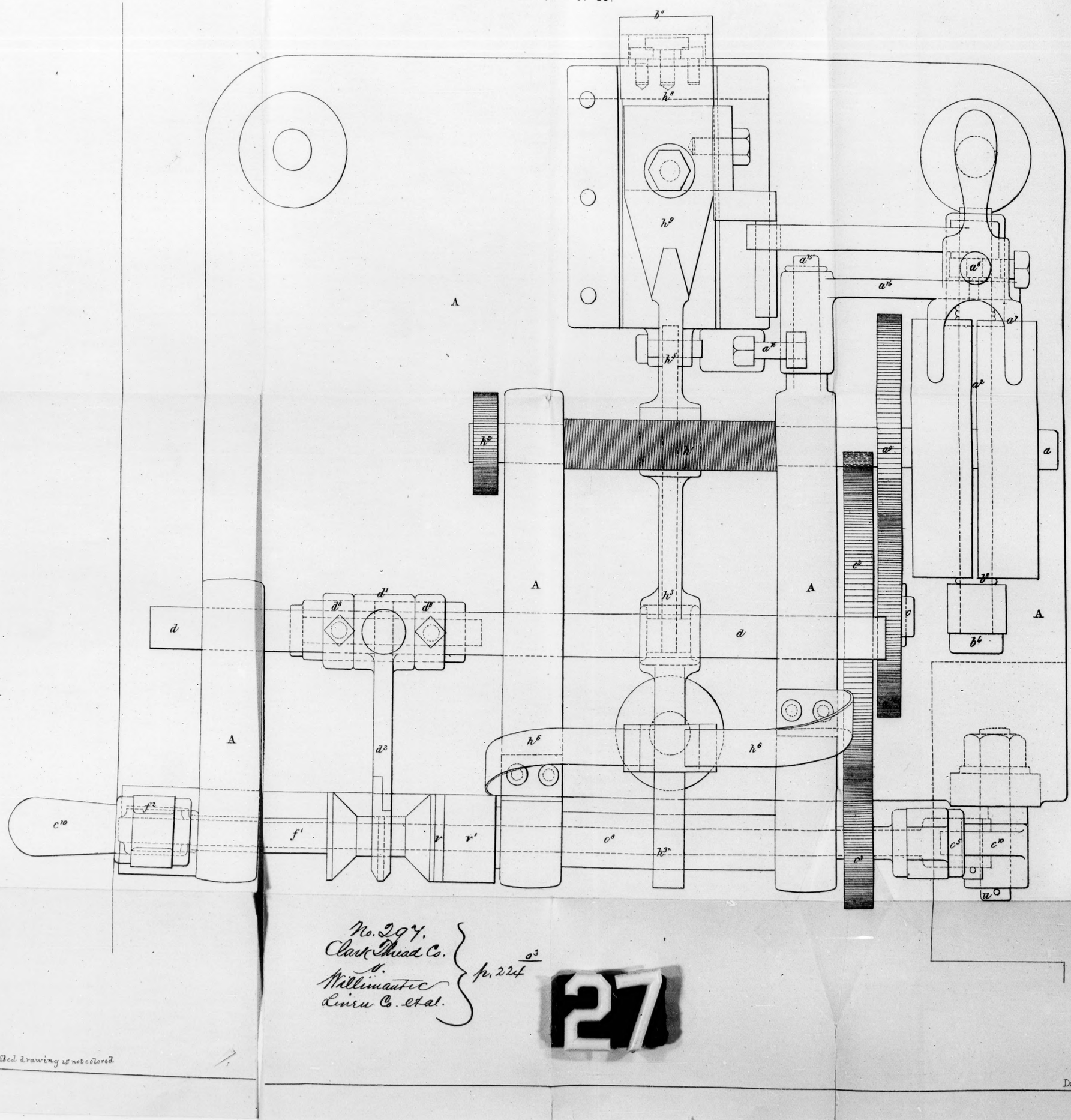
Drawn on Stone by Malby & Sons

26

A. D. 1858. JANY. 22. N° 122
WEILD'S SPECIFICATION.

(22 SHEETS)
SHEET 22.

FIG. 50.



No. 297.
Clark Thread Co.
v.
Willimantic
Linen Co. et al.
p. 224 $\frac{c^3}{}$

27

The filed drawing is not colored

Drawn on Stone by Malby & Sons

A.D. 1852. JUNE 1. N° 14,15'
WILLIS' SPECIFICATION.

(2 SHEETS) SHEET 1.

FIG. 1.

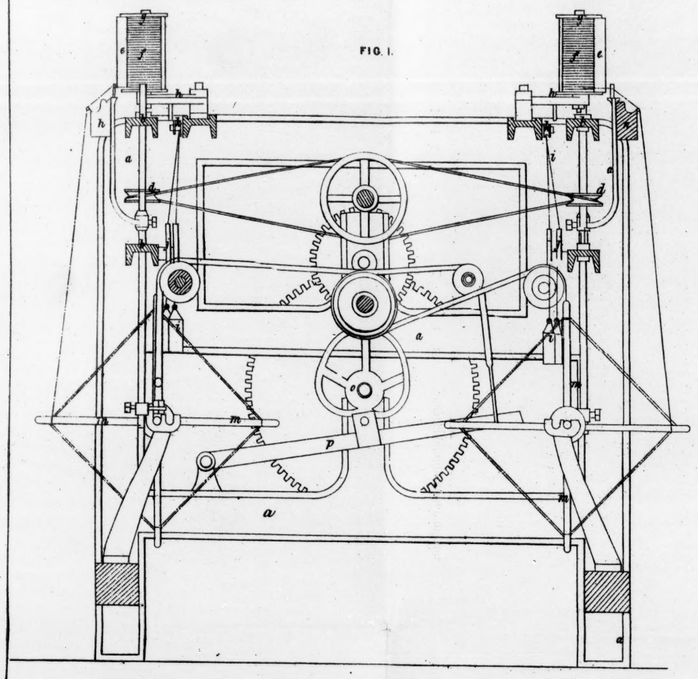


FIG. 2.

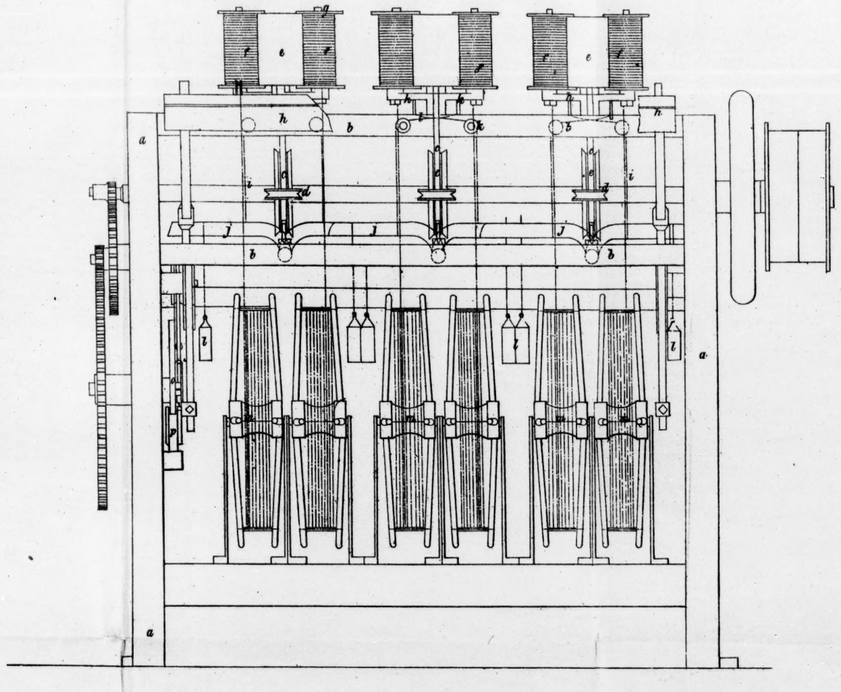


FIG. 3.

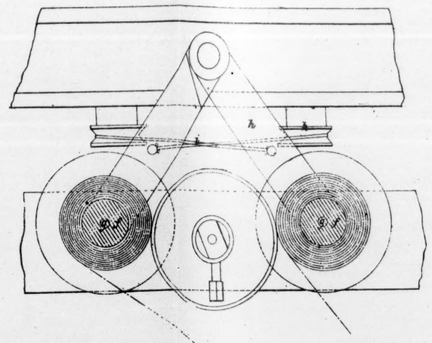
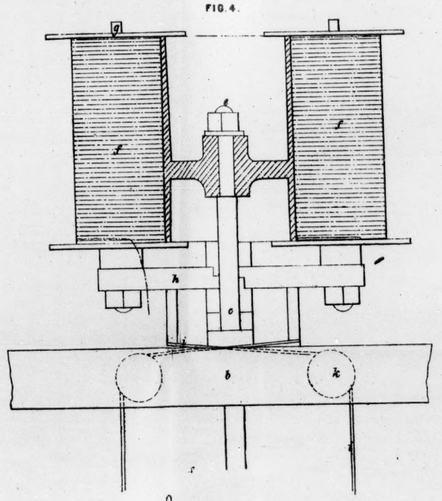


FIG. 4.



No. 297.
Clark Thread Co.
v.
Willimantic Linen Co.
et al.
} p. 225 2

FIG. 5.

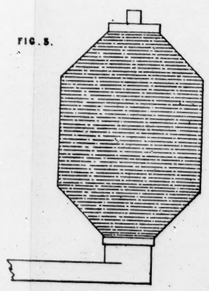


FIG. 7

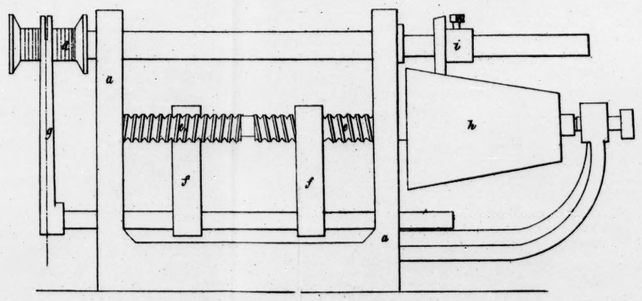


FIG. 8.

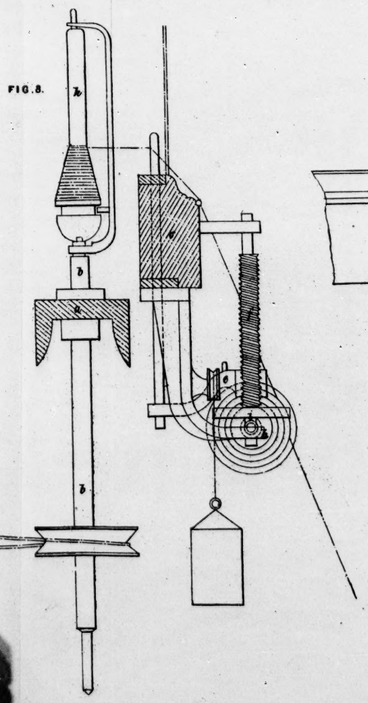


FIG. 9

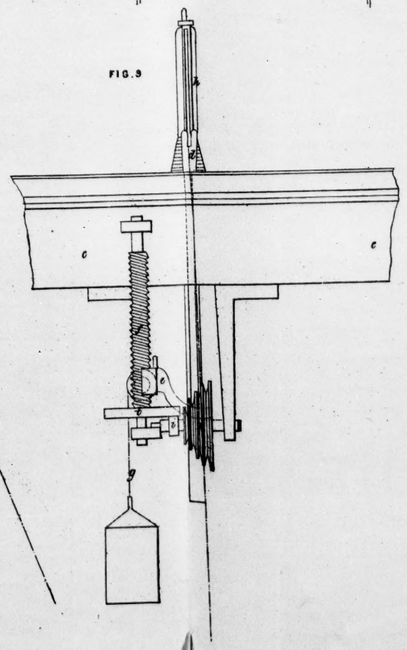
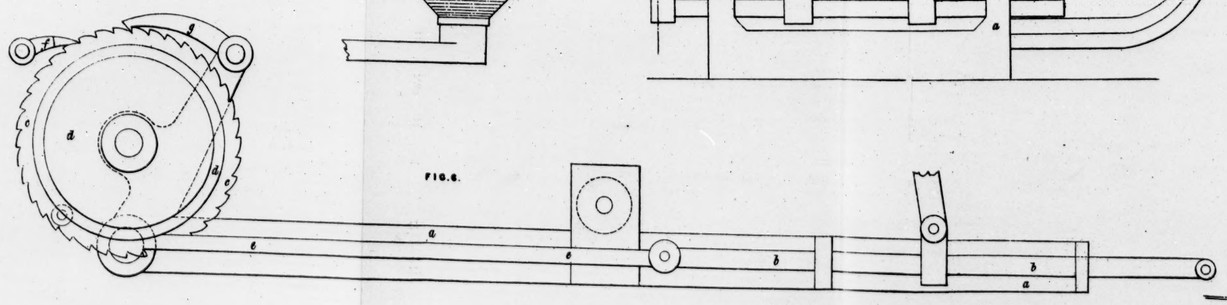


FIG. 6.



The enrolled drawing is partly colored.

Drawn on Stone by Malby & Sons

28

A.D. 1852. JUNE 1. N°14151.
WILLIS' SPECIFICATION.

225 A

9 SHEETS
SHEET 2

FIG. 1.

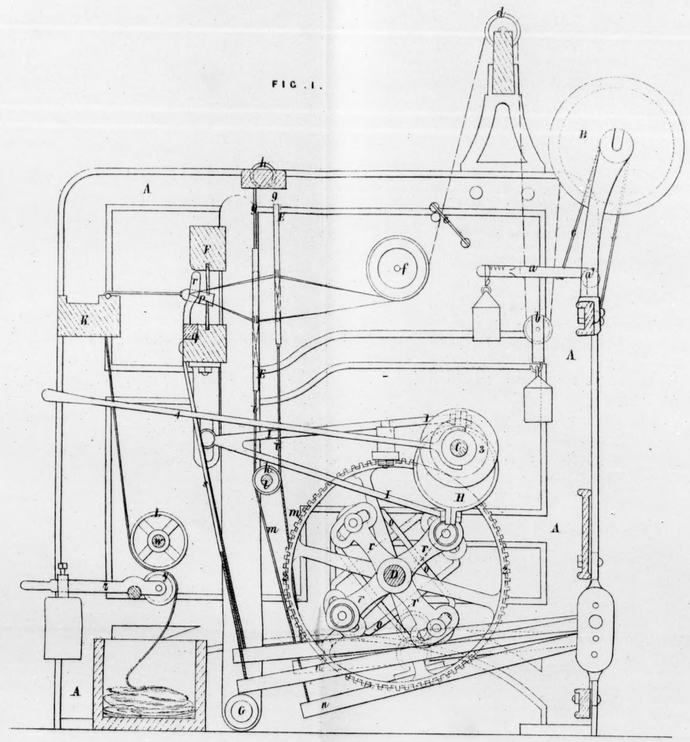
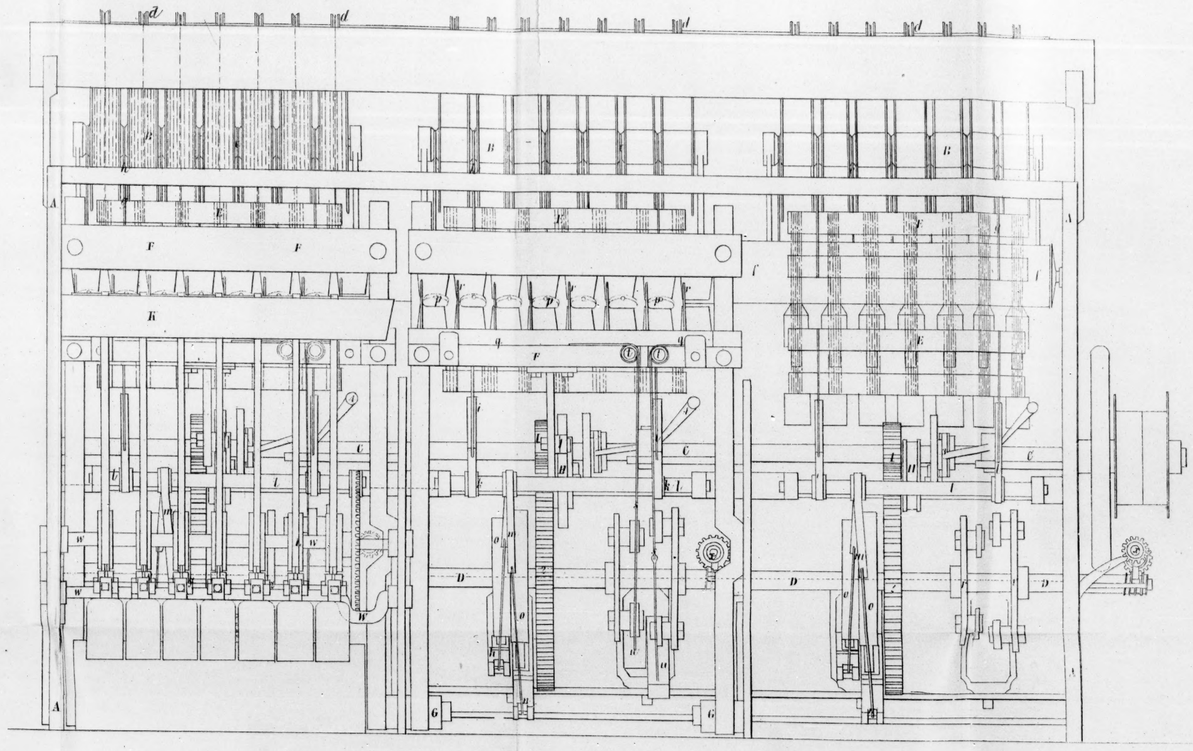


FIG. 2.



No. 297.
Clark Thread Co.
v.
Willimantic Linen
Co. et al.
} N. 225 1/2

FIG. 3.

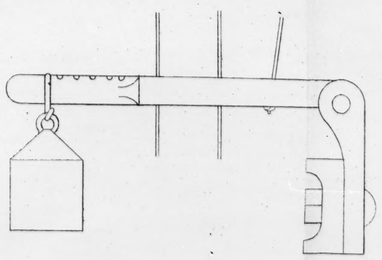


FIG. 4.

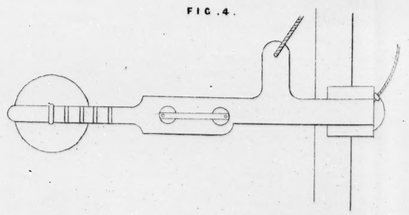


FIG. 5.

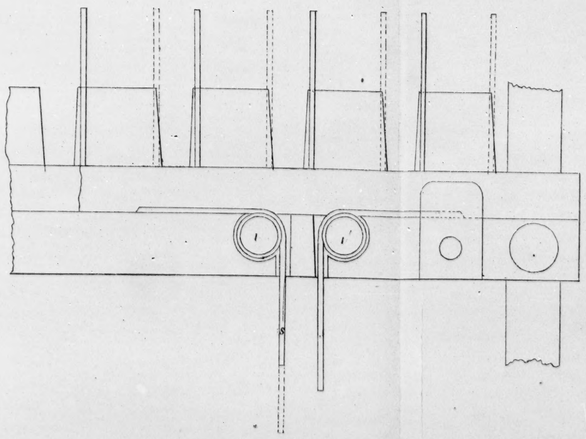
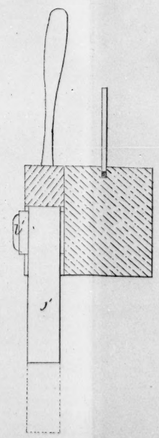


FIG. 6.



The enrolled drawing is partly colored

Drawn on Stone by Dalby & Sons

29

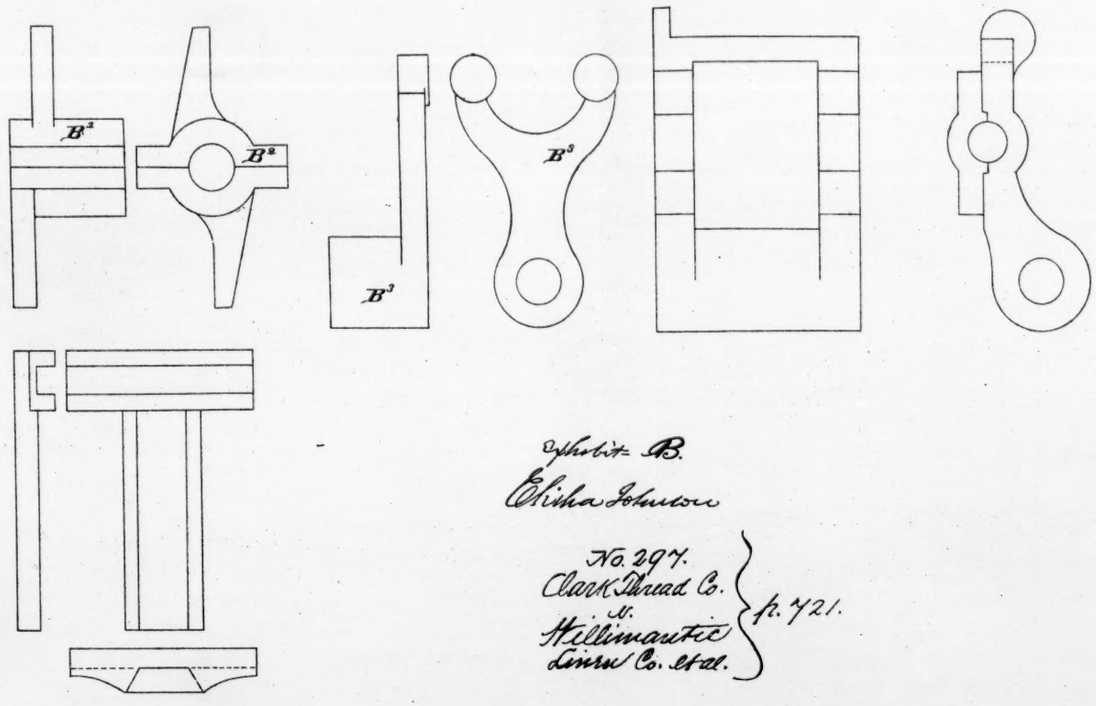


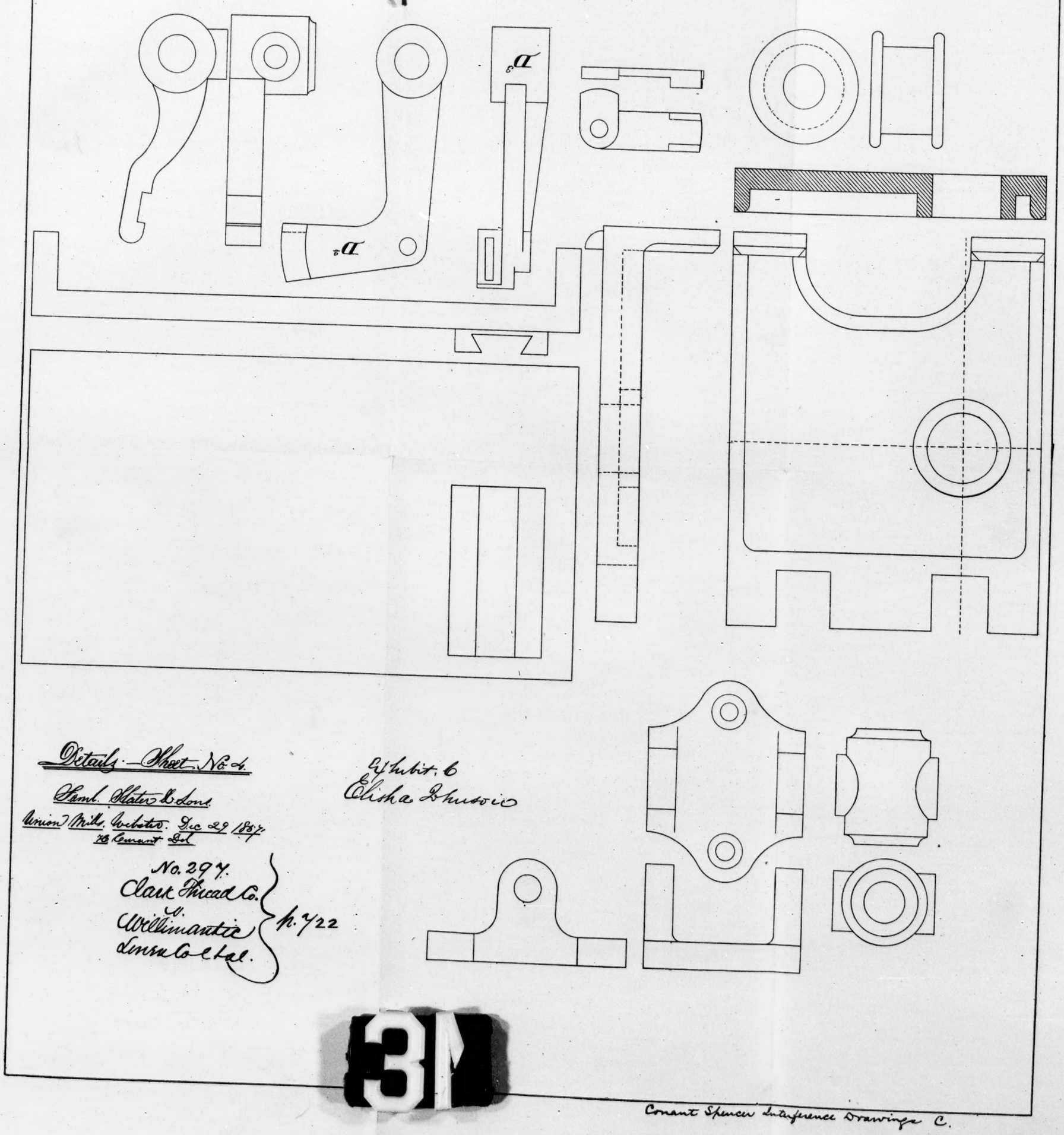
Exhibit B.
Elisha Johnson

No. 297.
Clark Thread Co.
v.
Willimantic
Linen Co. et al.
p. 721.

Consent Spencer Interference Drawings B

310

722



Details. Sheet No. 4.

Samb. Slater & Sons.

Union Mills. Webster. Dec 29 1887

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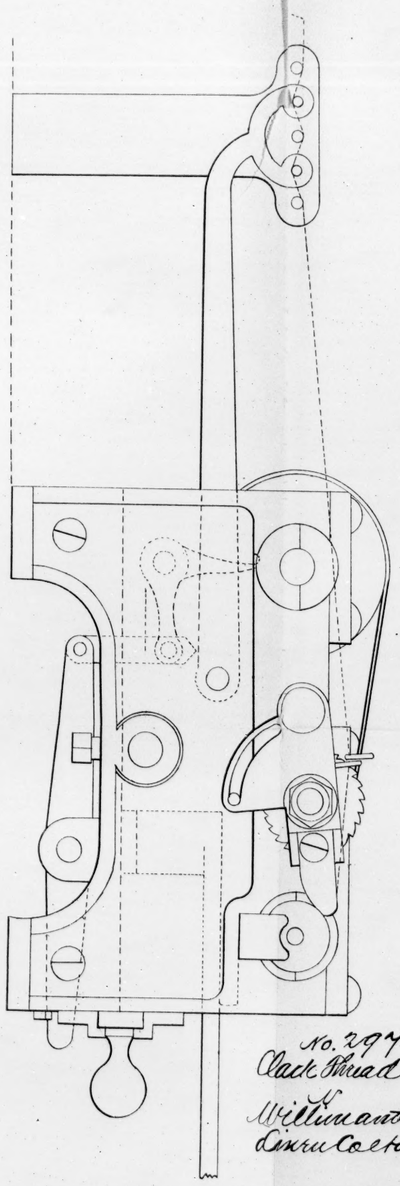
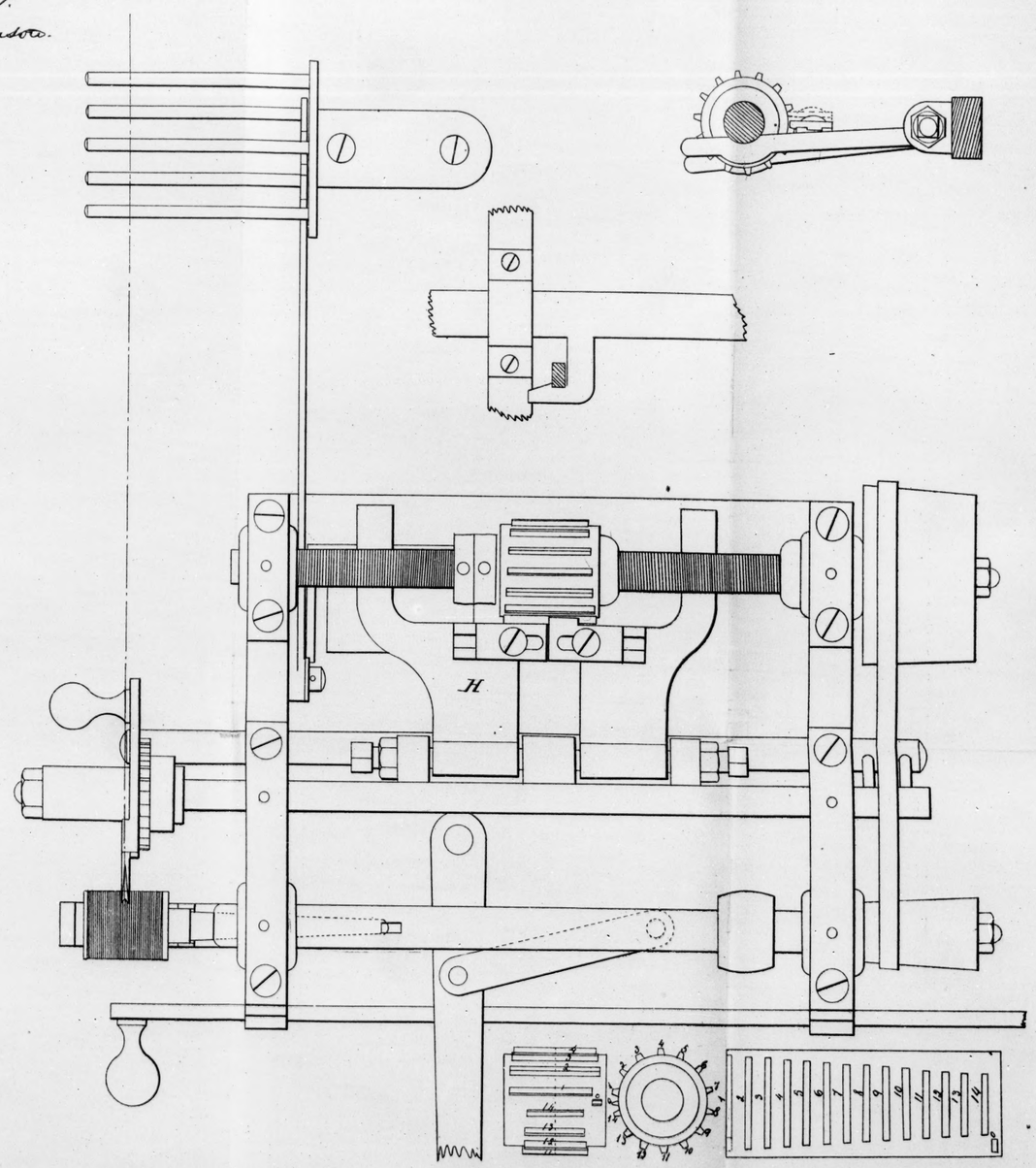
No. 297.
Clark Thread Co.
v.
Willimantic
Linen Co et al.
} h. 722

Exhibit 6
Elisha Dimock

Conant Spencer Interference Drawings C.

Exhibit I.
Elisha Johnson.





No. 294.
Clark Rhoades.
Willimantic
Conn Coetal
p 723

32

Elisha Johnson
A -
No. 297.
Clark Thread Co.
Willimantic
Linen Co. et al
h. 724.

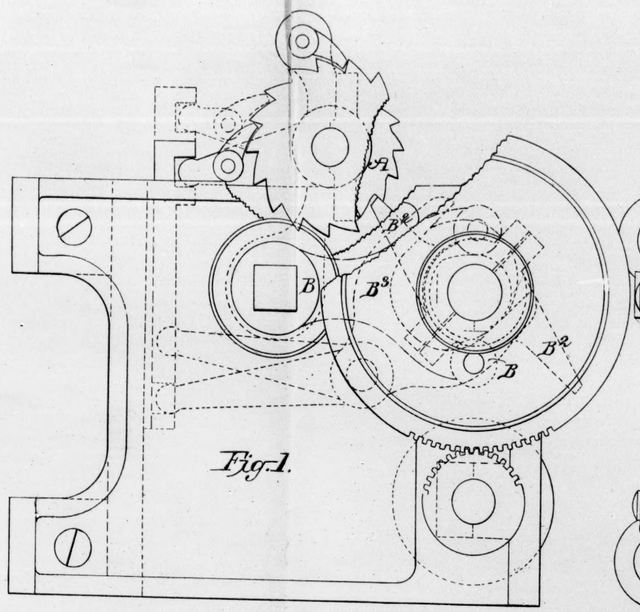


Fig. 1.

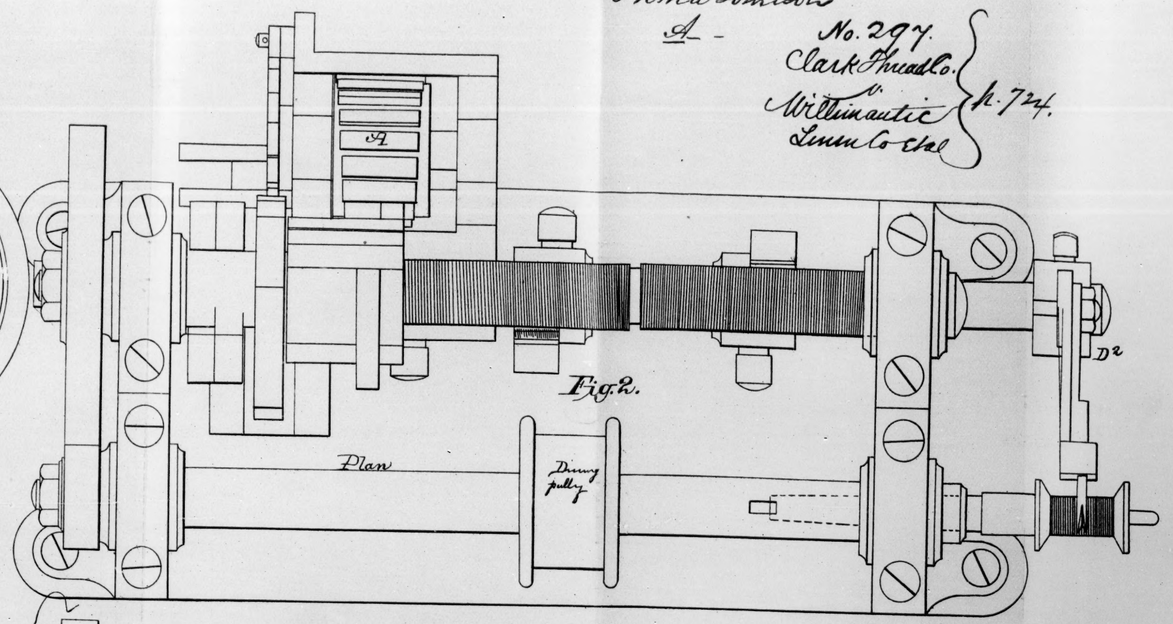


Fig. 2.

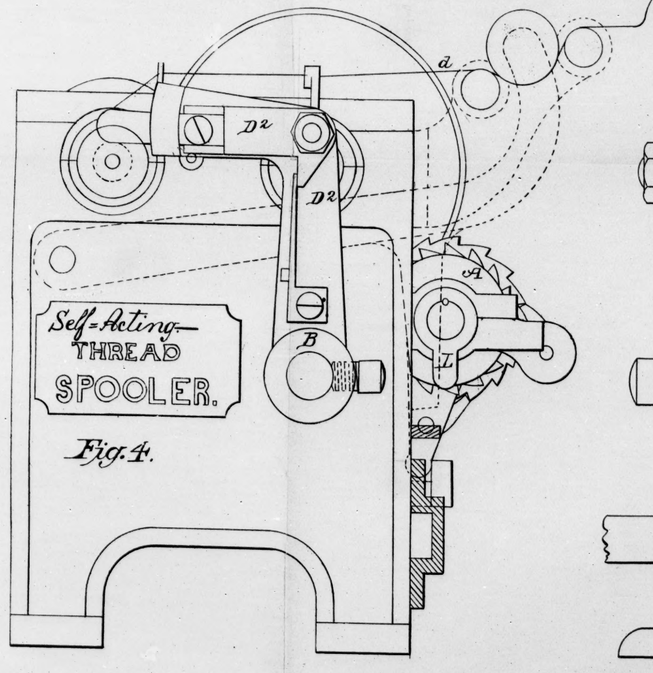


Fig. 4.

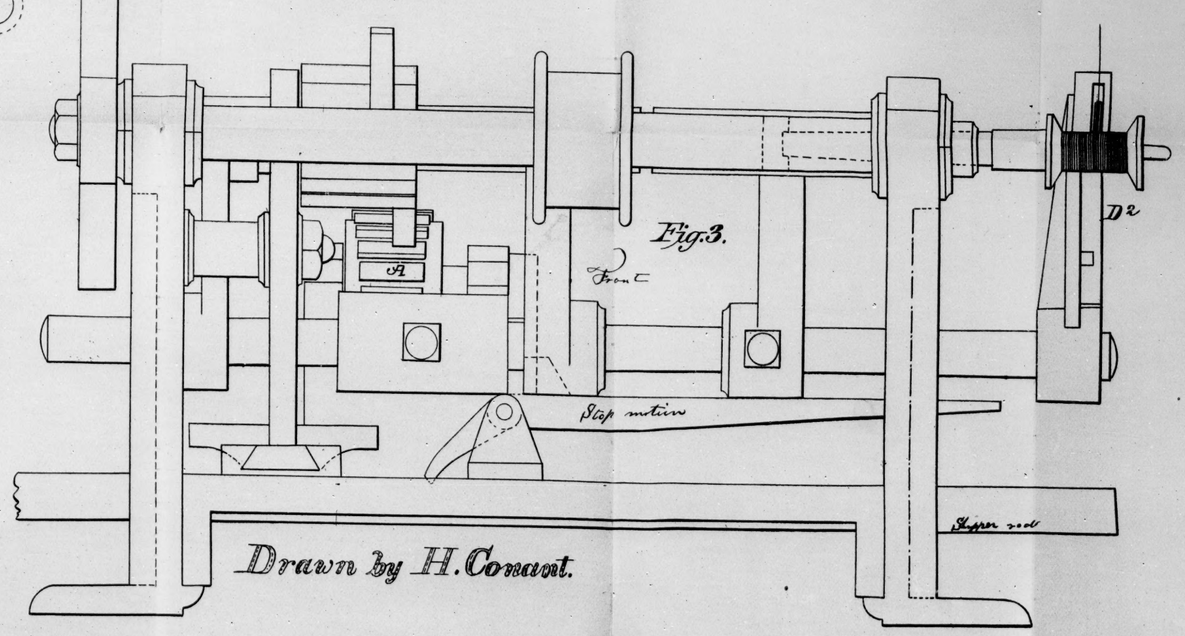


Fig. 3.

Drawn by H. Conant.

Consent Spencer Interference Drawings A

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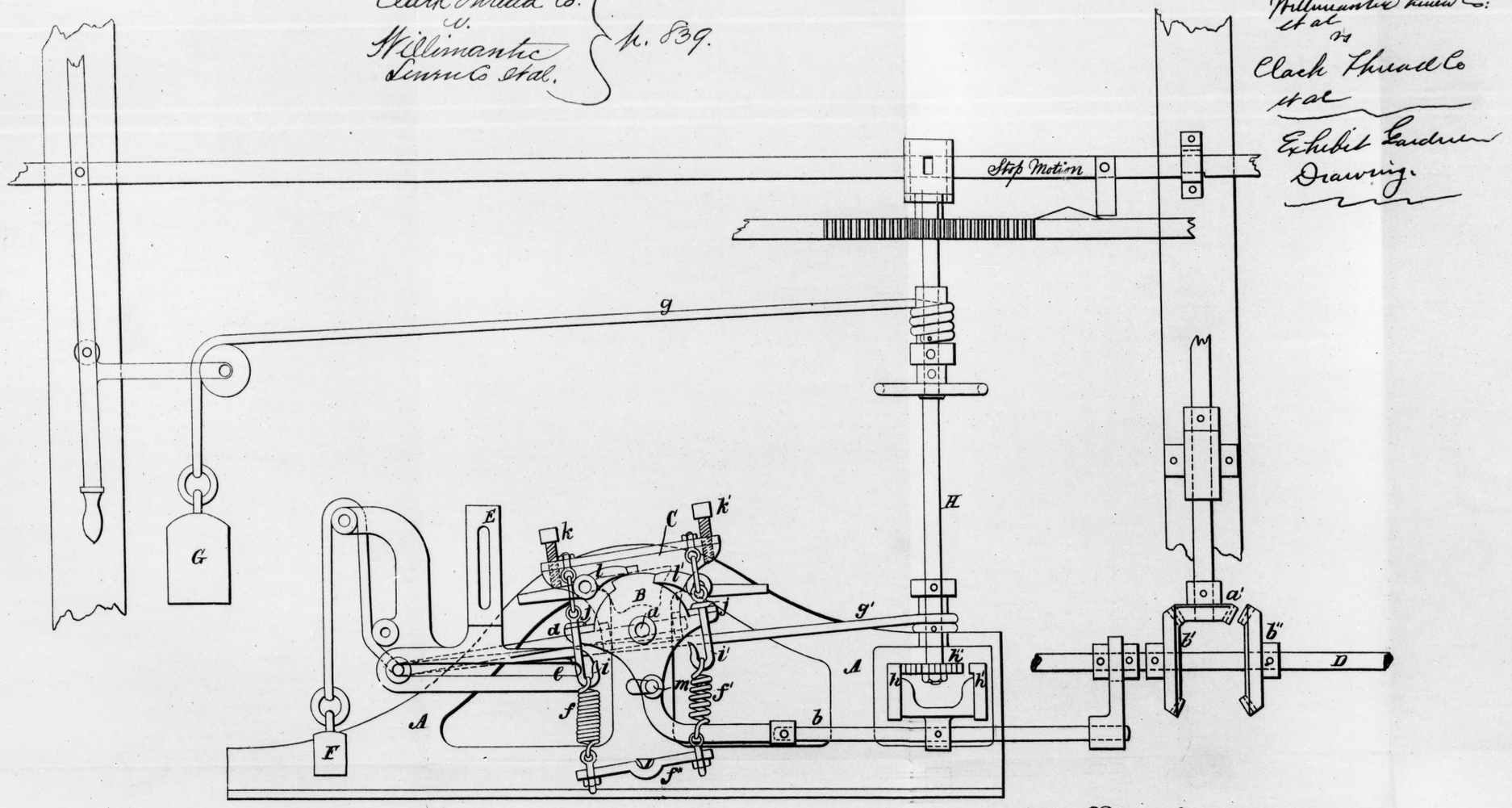
No. 297.
Clark Thread Co.
v.
Willimantic Linen Co. et al.
} p. 839.

Willimantic Linen Co. et al
vs
Clark Thread Co et al
Exhibit Gardner
Drawing.



Clark Thread Company, Newark, N.J
Traverse Motion
for Stubbing, Roving, Intermediate or Jack Frames
Scale 3" = one foot
May 29th 1885.

34

No. 297.
Clark Thread Co.
v.
Willimantic Linen Co. et al
} p. 840

840

Elisha Johnson
A.

Fig. 1.

Fig. 2.

Plain a Drawing pulley

Fig. 3

Front

Stop motion m

Sheet 2 of 2

Fig. 4.

Self-Acting
THREAD
SPOOLER.

Drawn by H. Conant.

35

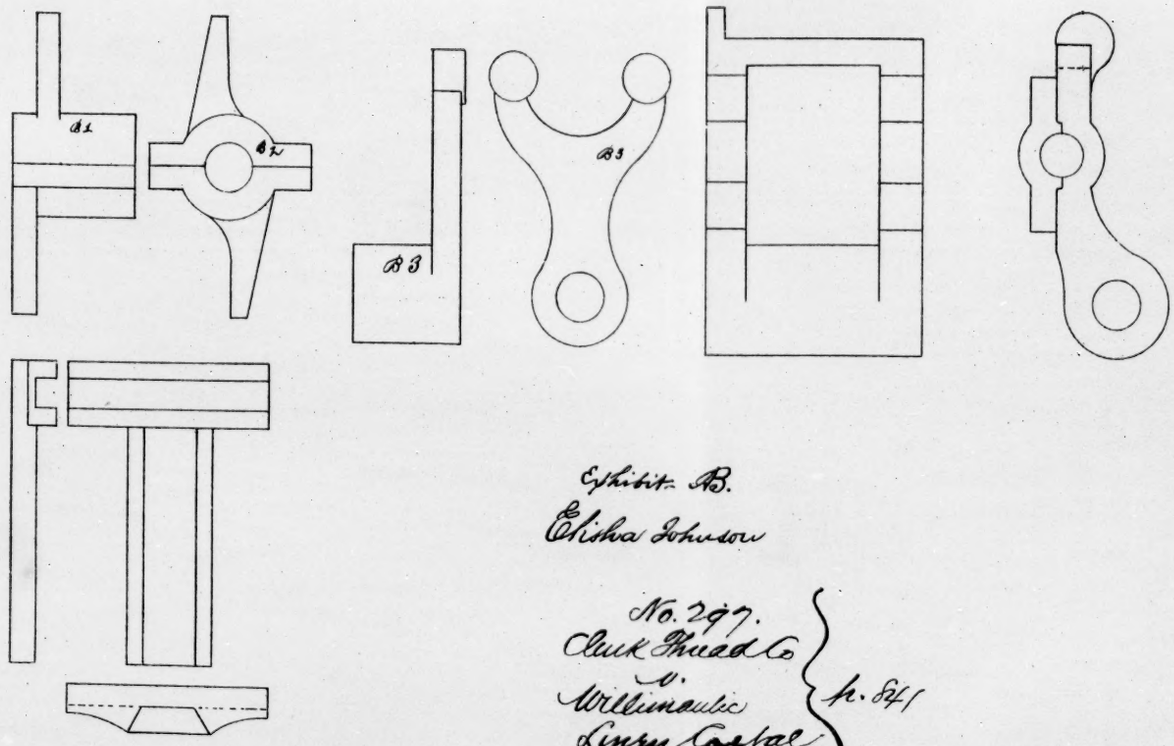


Exhibit B.
Elisha Johnson

No. 297.
Clark Thread Co
v.
Willimantic
Linen Co et al

} p. 841

Compared with original
by E. S. R.

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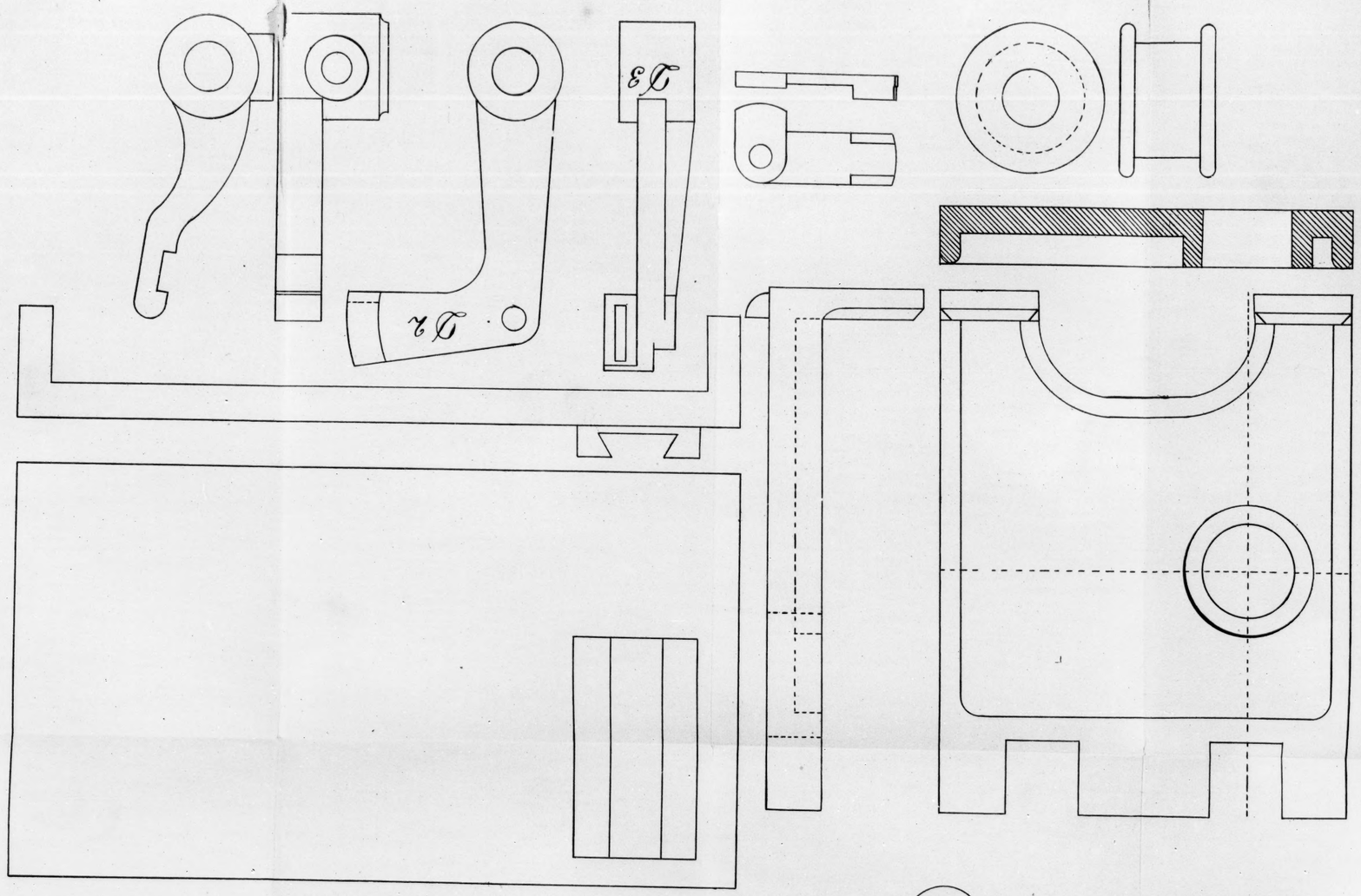
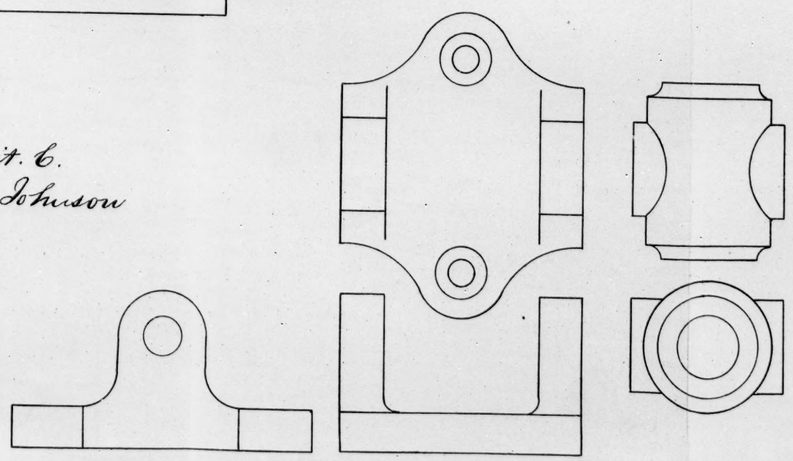
842.





Details:- Sheet No 4.

Saml Slater & Sons

Union Mills Webster Dec 29 1857.
Ms Conant Del

No. 297.
Clark Thread Co.
vs.
Willimantic
Linen Co.
} p. 842

Exhibit 6.
Elisha Johnson

Compared with original
by E. S. R.

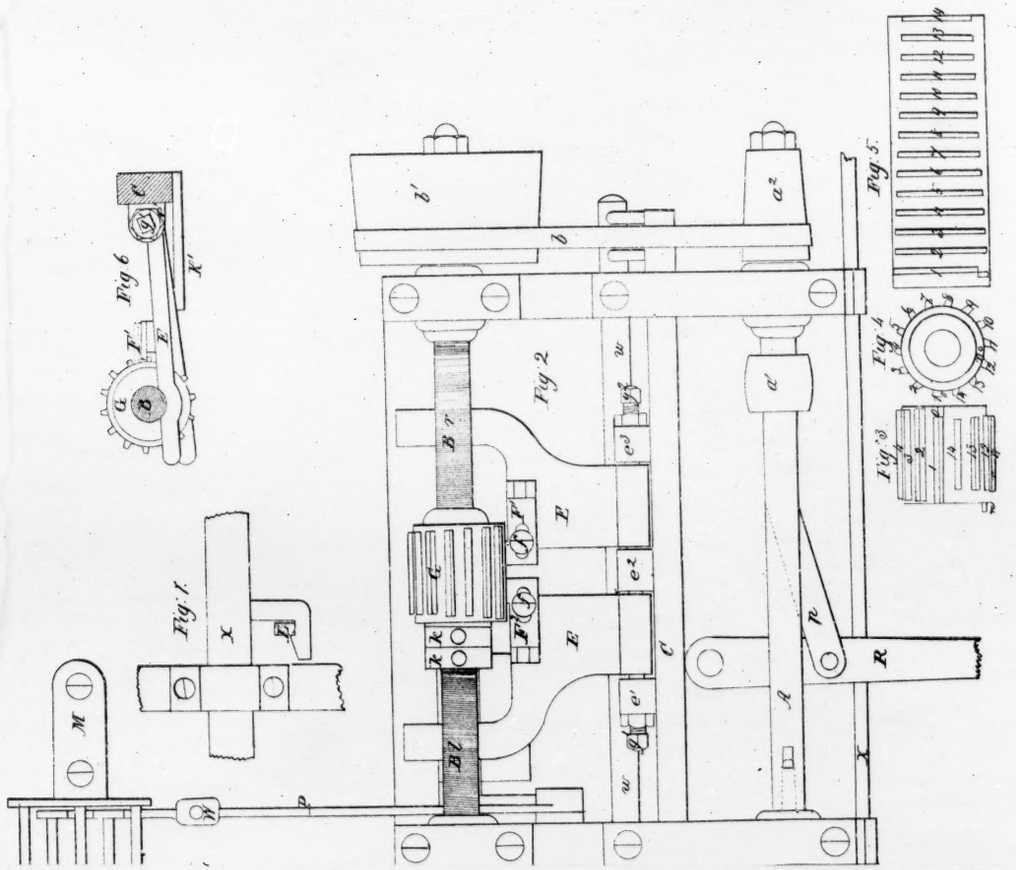
37

Sheet 1-3 Sheets.

W. H. Conant.

Machine for Winding Spooling Thread.

No. 26,415. Patented Dec. 13, 1859.



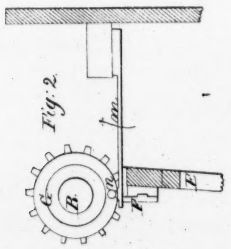
38

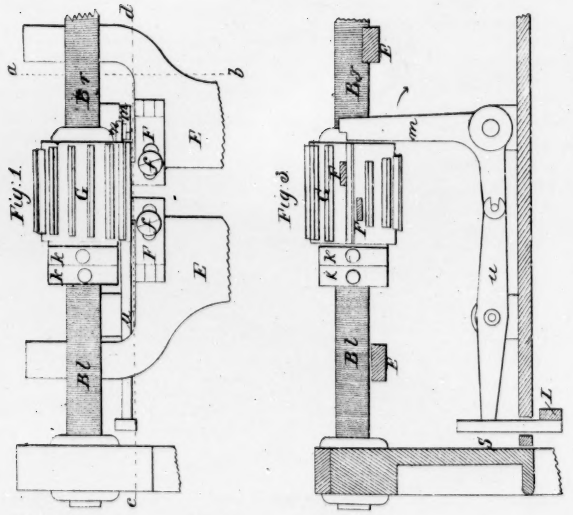
78 H. Conant.

Sheet 2-Sheets.

Machine for Winding Spooling Thread.

No. 26,415. Patented Dec. 13, 1859.





Witnesses:
J. Mattern
Wm. Ambler

Inventor;
Hezekiah Conant

79

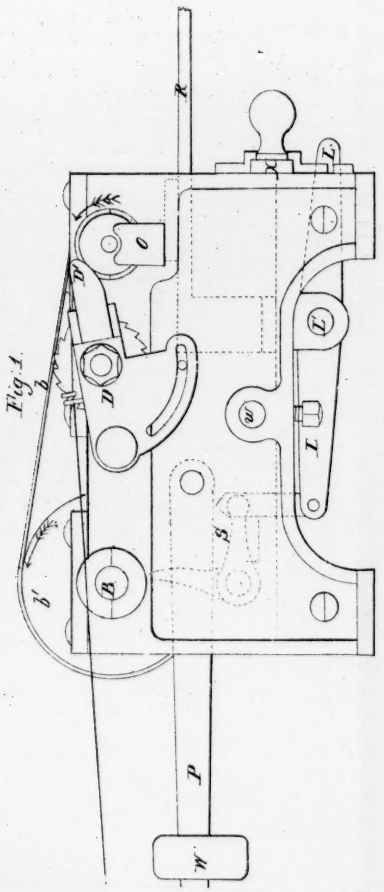
Sheet 3 - 3 Sheets.

H. Conant.

Machine for Winding Spooling Thread.

No. 26,415. Patented Dec. 13, 1859.

Fig. 1.



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